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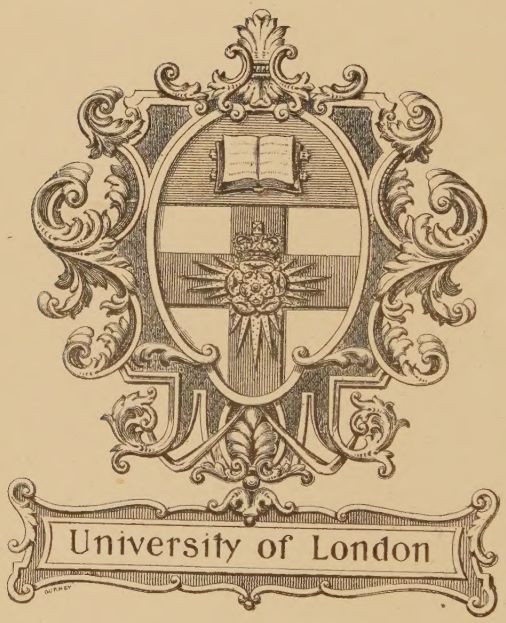

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December, 1870.

THE

LAW REPORTS.

Equity Cases,

INCLUDING

Bankruptcy Cases,

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

VOL. X.

1870.—XXXIV VICTORIÆ.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1870.

BIBL. LONDIN

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Equity Cases

(*Including Bankruptcy Cases*)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

BRISTOW *v.* SKIRROW.

M. R.
1870
April 23.

Power—Appointment by Will—Destination of Property ineffectually appointed.

C., by his will, bequeathed a leasehold estate called *S. H.*, after the death of his wife, upon the same trusts as his wife should declare with respect to the disposition of her residuary personal estate by her will; and in default of any disposition by his wife of her residuary personal estate, or so far as the same (if any) should not extend, upon other trusts.

C.'s wife survived him, and by her will gave to *S.* and *R.*, whom she appointed her executors, "all her property and estate known as *S. H.*," in trust for *T.* for life; and gave all her real and personal estate to *S.* and *R.* upon trust for conversion, and upon trust out of the proceeds to pay her debts, funeral and testamentary expenses, and legacies; and gave "the residue of her property," as to two thirds, for charitable purposes:—

Held, that the *S. H.* estate was not by the will of the widow converted into her own estate, and that, subject to the life interest of *T.*, two thirds of it went to the persons entitled under *C.'s* will in default of appointment.

BY a settlement dated the 10th of October, 1837, a leasehold estate at *Soond*, in *Cheshire*, called *Hill House*, was settled in trust for Sir *John Chetwode* for life, with remainder in trust for Lady *Chetwode* for life, with remainder in trust for such persons as Sir *John Chetwode* should by deed or will appoint.

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1870
BRISTOW
v.
SKIRROW.

Sir *John Chetwode*, by his will, dated the 24th of October, 1843, appointed the estate, after the death of the survivor of himself and Lady *Chetwode*, "to the same uses, upon the same trusts, and to and for the same intents and purposes as his said wife might have declared, or should thereafter declare, with respect to the disposition of her residuary personal estate," by will or codicil, and "in default of any disposition by his wife of her residuary personal estate, or so far as the same (if any) should not extend," upon such trusts as he should by any codicil appoint, and in default of such appointment upon trust for the person or persons who should at the death of the survivor of himself and his wife be his next of kin according to the statute.

Sir *John Chetwode* made no codicil to his will, and predeceased his wife, who married a Mr. *Hutchinson*, who also predeceased her.

Mrs. *Hutchinson*, by her will, dated the 27th of March, 1858, appointed *Charles Fletcher Skirrow* and *Alexander Hamilton Robson* executors and trustees thereof, and bequeathed to them "all her property and estate known as *Soond Hill*, in *Cheshire*," upon trust to pay the rents to *Charlotte Tiley* for life; and gave and bequeathed all her personal estate, and all the real estate of or to which she should at the time of her decease be beneficially entitled, seised, or possessed, whether in remainder, reversion, or expectancy, to *Skirrow* and *Robson*, upon trust for conversion, and upon trust out of the proceeds to pay her debts, funeral and testamentary expenses, and legacies; she then gave several pecuniary legacies, and gave and bequeathed "all the residue of the property of which she should die possessed, either in reversion, remainder, or expectancy, not thereinbefore disposed of," as follows: one third to *St. George's Hospital* (which is by its charter of incorporation empowered to acquire and hold land), one third to *Queen Charlotte's Lying-in Hospital*, and the remaining third to the *Houseless Poor Society*.

Mrs. *Hutchinson* died in 1858, and this suit was shortly afterwards instituted for the administration of her estate.

By the decree on the hearing of the cause, on further consideration, in December, 1859, it was declared that *Charlotte Tiley* was entitled to the rents of the *Soond Hill* estate during her life, and that two thirds of the testatrix's real estate and personal estate,

not capable of being given by will to charitable purposes, belonged to her heir-at-law and next of kin; and the remaining one third thereof to *St. George's Hospital.*

Charlotte Tiley having died in 1869, a Petition was now presented by the executors and trustees of Mrs. *Hutchinson's* will, praying for (among other things) the sale of the *Soond Hill* estate.

Sir *R. Baggallay*, Q.C., and Mr. *Rowcliffe*, for the Petitioners, asked for a declaration of the opinion of the Court upon the question, whether the two thirds of the *Soond Hill* estate which were given by the will of Mrs. *Hutchinson* to *Queen Charlotte's Lying-in Hospital* and the *Houseless Poor Society*, belonged to the next of kin of Mrs. *Hutchinson*, or to the next of kin of Sir *John Chetwode* at the death of Mrs. *Hutchinson.*

Mr. *Jessel*, Q.C., and Mr. *Bagshawe*, for *St. George's Hospital.*

Mr. *Hanson*, for the trustee of the settlement of 1837.

Mr. *Methold*, for the next of kin of Mrs. *Hutchinson* :—

The testatrix has executed the power of appointment over the *Soond Hill* estate given to her by the will of Sir *John Chetwode*, so as to make it part of her own estate, and consequently the trusts which she has declared of two thirds of it having failed, those two thirds go to her next of kin : *Chamberlain* v. *Hutchinson* (1); *Lefevre* v. *Freeland* (2); *Brickenden* v. *Williams* (3); *Wilkinson* v. *Schneider* (4); Lord *St. Leonards* on Powers (5). The testatrix, by speaking of this estate as "her property and estate," and giving it to her executors, has shewn conclusively that she intended to make it part of her general estate: *Brickenden* v. *Williams.*

Mr. *Southgate*, Q.C., and Mr. *Bird*, for the next of kin of Sir *John Chetwode* at Mrs. *Hutchinson's* death, were not called on.

LORD ROMILLY, M.R. :—

I feel no doubt about this case. I think the words of Mrs. *Hutchinson's* will are perfectly distinct, and that the effect is exactly

(1) 22 Beav. 444.
(2) 24 Ibid. 403.
(3) Law Rep. 7 Eq. 310.
(4) Ibid. 9 Eq. 423.
(5) 8th Ed. p. 467.

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the same as if she had omitted all mention of those two charities. She has given the residue of her property expressly to three charities—*St. George's Hospital*, which is competent to take, and two other charities, which by law are incompetent to take this leasehold estate, and therefore I must take her will as perfectly silent as to those two charities, and regard it as if there was no disposition whatever in their favour.

Then, if we look at Sir *John Chetwode's* will we find that it provides for this contingency. The words are, "upon the same trusts, and to and for the same intents and purposes, as my wife may have declared or shall hereafter declare with respect to the disposition of her residuary personal estate." She has declared that her residuary personal estate is to go in thirds, and two thirds of this leasehold property the law will not allow to go in the way she has said. Then his will proceeds, "and in default of any disposition by my wife of her residuary personal estate, or so far as the same (if any) shall not extend" (it does not extend to either of these two thirds) then upon trust as he should appoint by codicil (he has not done that), and in default of such appointment, then in trust for the persons who should be his own next of kin at the death of the survivor of himself and his wife. I am, therefore, quite clear that the property goes to the persons who were his next of kin at the death of his wife.

I think the cases which have been referred to merely amount to this, and I am quite sure my own decisions merely amount to this: namely, the donee of a power gives property to his executors, thereupon the executors take it as part of the property of the appointor, and as in that character they do not take it beneficially, they take it in trust, that is, first to pay creditors and then the legatees, and if there are no legatees, then in trust for the next of kin of the appointor. But that is not the case here. The property is expressly given to the next of kin of Sir *John Chetwode* in default of any disposition by his wife of her residuary personal estate, and of two thirds she has made no disposition.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle*; Messrs. *Duncan & Murton*; Messrs. *Palmer, Eland, & Nettleship*; Messrs. *Paterson, Snow, & Burney.*

In re HUISH'S CHARITY.

M. R.
1870
March 28;
April 28.

Appointment—Fraud on Power—Benefit of Appointor—Vendor and Purchaser —Specific Performance.

30 L.D. 487.

An appointment made with the object that the appointor may obtain an exclusive advantage to himself is bad; but if the object of the appointment be to secure a benefit for all the objects of the power, the appointment is not bad, although the appointor may to some extent participate in such benefit.

The tenant for life of real estate under a marriage settlement had a power of appointing the estate among the children of the marriage, of whom there were four. The settlement contained no power of granting building leases. An appointment was made to one of the children of the marriage; and, subsequently, the appointor and appointee joined in conveying the estate to trustees upon trust to grant building leases, and subject thereto as to one fourth thereof upon trust for the appointee, and as to the remaining three fourths upon trusts corresponding with those of the original settlement:—

Held, that although the object of the appointment was to enable building leases to be granted, and the tenant for life thereby gained an advantage to himself, yet the transaction, being for the benefit of all the objects of the power, was valid; and that a purchaser would obtain a good holding title thereunder.

Whether such a title could be forced on an unwilling purchaser, *quære*.

THIS was a summons taken out for the purpose of obtaining the opinion of the Court whether a good title could be made to certain land which the trustees of *Huish's Charity* had contracted to purchase as a reinvestment of moneys arising from the sale of other lands which had belonged to the charity but had been taken by a railway company.

By indentures of lease and release, dated the 30th and 31st of October, 1827, and made in contemplation of a marriage then intended, and shortly afterwards solemnized, between *Edward William Batchellor* and *Eliza* his wife certain real estate was assured to the use of *E. W. Batchellor* for life, with remainder to *Eliza Batchellor* for life, with remainder to the use of the child, grandchild, or other issue, or all and every, or any one or more of the children, grandchildren, or other issue of the marriage, in such manner and form, and if more than one in such shares and for such estates or interests, as *Edward William Batchellor* and *Eliza* his

M. R. 1870 *In re* HUISH'S CHARITY.

wife should jointly appoint by deed, with remainder over in default of appointment for the benefit of the children of the marriage, if any, with the usual hotchpot clause, and, if none, for other persons. The settlement contained an ordinary power of leasing for twenty-one years, and powers of sale and exchange, but no power of granting building leases.

By an indenture, dated the 31st of October, 1827, certain personal estate was settled upon like trusts in favour of Mr. and Mrs. *Batchellor* and their issue.

There were issue of the marriage four children,—viz., *Samuel George*, *Edward Stratton*, *Emilia Marianne*, and *Arthur William*.

By a deed-poll dated the 2nd of January, 1856, Mr. and Mrs. *Batchellor* appointed the real estate comprised in their marriage settlement to *Edward Stratton Batchellor* in fee.

An indenture, dated the 22nd of October, 1856, was made between *Edward William Batchellor* and *Eliza* his wife of the first part, *Edward Stratton Batchellor* of the second part, and *Thomas Staunton* and *Thomas Frederick Inman* of the third part. It contained recitals of the settlements of real and personal estate made on the marriage of Mr. and Mrs. *Batchellor*, and of the deed-poll of the 2nd of January, 1856; and also recitals that *Edward Stratton Batchellor* had applied to *Edward W. Batchellor* and *Eliza* his wife to concur with him in granting one or more building lease or leases of the property appointed to him, and that it appeared that the same could be let to great advantage, and considerably improved in value by letting the same on such building lease or leases; that when the property had been so improved in value the same would be more than the proportional part or share of *Edward Stratton Batchellor* of and in the premises comprised in the recited settlements, having regard to the relative claims and interests of his brothers and sister; and that it had, therefore, been arranged that *Edward William Batchellor* and *Eliza* his wife should appoint to *Edward S. Batchellor* the sum of £1600, to be raised out of the settled personal estate, and that *Edward S. Batchellor* should thereupon join with *Edward W. Batchellor* and *Eliza* his wife in conveying the property appointed to him upon the trusts and in manner thereinafter appearing. By the witnessing part, *Edward W. Batchellor* and *Eliza* his wife appointed £1600, part of the

settled personal estate, to *Edward S. Batchellor*; and *Edward W. Batchellor* and *Eliza* his wife and *Edward S. Batchellor* conveyed the real estate unto and to the use of *Thomas Staunton* and *Thomas Frederick Inman* in fee, upon trust from time to time, with the consent in writing of *Edward W. Batchellor* and *Eliza* his wife and of *Edward S. Batchellor*, to grant building leases for any term or terms of years not exceeding ninety-nine years from the granting thereof; and subject to such leases, as to one-fourth part of the property thereby conveyed, upon trust for *Edward S. Batchellor*, his heirs and assigns, and as to the remaining three-fourth parts thereof upon such trusts, and with, under, and subject to such powers, agreements, and declarations as would most nearly correspond with the uses, trusts, powers, agreements, and declarations (other than the power of appointing new trustees) which were expressed and declared of and concerning the property by the thereinbefore recited settlement thereof; but so as to vest such powers and authorities as were thereby vested in the trustees or trustee thereof in the trustees or trustee for the time being of the indenture now in statement, instead of in the trustees or trustee for the time being of the settlement. No building lease was ever granted under the trust contained in this indenture.

The present vendors claimed under a sale made by *Edward S. Batchellor* and the trustees of the deed of the 22nd of October, 1856.

The conveyancing counsel to whom the title was referred was of opinion that a good title could not be made without the concurrence of the parties entitled in default of appointment by Mr. and Mrs. *Batchellor*, inasmuch as the whole transaction above stated had the appearance of being a preconcerted arrangement for the sole purpose of importing into the settlement a power to grant building leases, mainly, or at all events to some extent, for the benefit of the parents, the appointors.

The parties agreed to submit to an order on this summons as if a bill had been filed for specific performance of the contract.

Mr. *Jessel*, Q.C., and Mr. *F. A. Lewin*, for the vendors:—

There is nothing to shew that a fraud has been committed; and

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In re Huish's Charity.

the purchaser must accept the title in accordance with Lord *Eldon's* decision in *Macqueen* v. *Farquhar* (1).

Mr. *Badcock*, for the trustees of the charity:—

It is plain that the object of the whole transaction was to introduce a power of granting building leases not contained in the settlement; and though that power has never been exercised, the question still remains whether the power of appointment was exercised *bonâ fide* for the purpose for which it was given. And, in a case of this sort, grave suspicion will be a bar to a decree for specific performance: *Warde* v. *Dixon* (2). It is clear that there is here grave cause for suspicion: *Cooper* v. *Cooper* (3); *In re Marsden's Trusts* (4).

Mr. *Jessel*, in reply:—

Cooper v. *Cooper* and *In re Marsden's Trusts* were not cases in which any question arose between vendor and purchaser. In *Warde* v. *Dixon* there was much more than grave suspicion: there was actual proof that the settlement was fraudulent.

April 28. Lord Romilly, M.R.:—

This is an objection to the title of some land sold to the Charity. The objection is, that a certain appointment made in favour of *Edward S. Batchellor* was a fraud on the power authorizing the appointment.

The facts are these:—[His Lordship stated them.]

The contention is, that all these appointments and deeds were made in order to give the husband, the tenant for life, a power to grant building leases which he did not possess by the original settlement, and that consequently the transaction, being one to benefit him, was in fraud of the power of appointment contained in the indenture of settlement of the hereditaments made on the marriage. It is quite established by Lord *Redesdale's* judgment in *Vane* v. *Lord Dungannon* (5), that the motives of the settlor cannot be

(1) 11 Ves. 467.
(2) 28 L. J. (Ch.) 315.
(3) Law Rep. 8 Eq. 312; Ibid. 5 Ch. 203.
(4) 4 Drew. 594.
(5) 2 Sch. & Lef. 118.

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1870
In re HUISH'S CHARITY.

inquired into. Lord Justice *Turner*, however, lately, in a case of *Topham* v. *Duke of Portland* (1), drew a nice distinction between the *intent* of the settlor and his *motives;* but this appears to me to be a very thin distinction, and as a general rule I do not find any cases, unless the recent case of *Topham* v. *Duke of Portland* (2) be one, where the execution of a power has been set aside which has been literally performed, and under which the settlor has not obtained some exclusive benefit for himself not contemplated by the instrument creating the power. No doubt if it is to be laid down as an inflexible rule, following the first of these cases in the House of Lords, that the literal execution of the power in order to attain an object which the instrument creating the power did not sanction is a fraud on the power, although the object to be attained is one which confers great good on all the objects of the power, then this deed of January, 1856, must be considered an invalid appointment, for I think that the object of the appointment was to obtain a power of granting building leases; but then I observe that though the father and mother obtain some advantage by the building leases, it is one which extends equally to all the children, whether as appointees, or whether as taking in default of appointment—an advantage derived from the greatly improved value of the property, the whole of which they would be deprived of if the deed of January, 1856, be held to be void. In that case it would be (what I fear is too much the tendency of technical rules) to strain a rule intended for the purpose of benefiting the objects of the power to a rigid exactness which inflicts a plain and manifest injury on them. This, I think, is the evil attempted to be avoided by Lord *Eldon* in *Macqueen* v. *Farquhar* (3), and also in the case of *Cockcroft* v. *Sutcliffe* (4), which is a still stronger case, and which appears to me to be a most valuable decision:—[His Lordship read the head-note and part of the judgment.]

I adopt that case in its fullest extent. The meaning and the good sense of the rule appears to be, that if the appointor, either directly or indirectly, obtain any exclusive advantage to himself, and that to obtain this advantage is the object and the reason of its being made, then that the appointment is bad; but that if

(1) 1 D. J. & S. 517; 11 H. L. C. 32.
(2) Law Rep. 5 Ch. 40.
(3) 11 Ves. 467.
(4) 25 L. J. (Ch.) 313.

10 Jur. N.S. 323

W.S.C. 10 Jur. N.S. 501

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the whole transaction taken together shews no such object, but only shews an intention to improve the whole subject-matter of the appointment for the benefit of all the objects of the power, then the exercise of the power is not fraudulent or void, although by the force of circumstances such improvement cannot be bestowed on the property which is the subject of the appointment without the appointor to some extent participating therein.

I think that this is that case, and that a good title can be made, although the property is sold under the powers contained in the deed of October, 1856.

Before going further I wish to know exactly what is the question which the parties desire to leave to me. Is the question whether a good title can be made; or is it whether the title is such that it ought to be forced on an unwilling purchaser?

Mr. *Badcock*:—The trustees of the Charity are not unwilling purchasers, but are ready to accept the title if your Lordship is of opinion that they can safely do so.

LORD ROMILLY, M.R.:—Then I shall read the rest of my judgment, which I have written very much in that view.

I admit that the question is open to some argument, but, in my opinion, the doubt is not sufficient to cast discredit on the title, nor is it one sufficient to induce me to abstain from making a decree for specific performance against the purchaser, and consequently I must hold that the Charity must take the title.

Solicitors: Messrs. *Lewin & Co.*; Messrs. *Stephens & Langdale.*

In re JOINT STOCK DISCOUNT COMPANY.

WARRANT FINANCE COMPANY'S CASE. (No. 2.)

M. R.
1870
March 12.

Proof in Winding-up—Proof against Two Estates—Interest—Delivery up of Securities.

A secured creditor cannot be deprived of his security until he has been paid in full the principal, interest, and costs due thereon.

A holder of bills of exchange drawn upon and accepted by company *A.* and indorsed by company *B.* proved the bills against both companies, which were in liquidation and received dividends from both estates. The liquidator of company *A.* applied for an order for delivery up of the bills on payment of a balance arrived at by treating all dividends paid by company *A.* as applied in reduction of principal, and those paid by company *B.* as applied first in payment of interest, and then, as to the surplus, in reduction of the principal:—

Held, that the balance was calculated on an erroneous principle, and that the creditor could not be required to deliver up the bills until he received his principal, interest, and costs in full.

THIS was a summons by the official liquidator of the *Joint Stock Discount Company, Limited*, asking that the *Warrant Finance Company, Limited*, might be ordered, upon payment to them of the sum of £79 7*s.* 7*d.*, to deliver up certain bills of exchange held by them.

The bills of exchange in question were drawn upon and accepted by the *Contract Corporation* for sums amounting in the whole to £13,000, and were indorsed by the *Joint Stock Discount Company*. Both companies were in the course of being wound up, and the *Warrant Finance Company* proved against both estates for the amount of the bills.

Previously to November, 1867, the *Joint Stock Discount Company* paid four dividends on their debts, amounting in the whole to 10*s.* in the pound, and in May, 1868, the same company paid a fifth dividend of 2*s.* in the pound. In the interval between November, 1867, and May, 1868, the *Contract Corporation* paid on their debts two dividends amounting together to 2*s.* 3*d.* in the pound. Both companies had since paid further dividends, and the *Warrant Finance Company* had, by means of such dividends, received 20*s.* in the pound on their debt; but they claimed to be

M. R. 1870 — WARRANT FINANCE COMPANY'S CASE. (No. 2.)

entitled to continue to receive dividends until they had been paid interest on their debts in addition to the principal, and it was decided by Lord Justice *Giffard* that such claim was well founded: *Warrant Finance Company's Case* (1).

The balance of £79 7*s.* 7*d.*, which the liquidator of the *Joint Stock Discount Company* now admitted to be due to the *Warrant Finance Company*, was arrived at in this way: The dividends paid previously to November, 1867, were all treated as applied in reduction of the principal debt; then the dividends paid by the *Contract Corporation* were treated as applied first in payment of interest, and then, as to the surplus, in payment of principal; then subsequent interest was calculated as on the principal thus reduced, and the subsequent dividends of the *Joint Stock Discount Company* were treated throughout as applied in payment of principal, and those of the *Contract Corporation* as applied first in payment of interest, calculated as already mentioned, and then in reduction of capital. The *Warrant Finance Company* contended that this balance was calculated altogether on an erroneous principle, and that the dividends of the *Joint Stock Discount Company*, like those of the *Contract Corporation*, ought to be treated as applied in payment of interest, and then, as to the surplus, only in reduction of principal; and they claimed payment of a much larger balance before giving up the bills.

Mr. *Jessel*, Q.C., and Mr. *Locock Webb*, for the liquidator of the *Joint Stock Discount Company*:—

We admit that all sums received from the *Contract Corporation* are, as between us and the holders of the bills, to be treated as applied in the first place in payment of interest, and then in reduction of principal; but we say that sums paid by us are applicable only to payment of principal, and cannot be treated as applied in any other way. All that was decided by the Lord Justice in the former case (2) was, that the proof against the *Contract Corporation* was to be treated in the same way as a mortgage or other security for the payment of the debt; and, consequently, that payments made in respect of that proof were to be treated as applicable in payment of interest

(1) Law Rep. 5 Ch. 86. (2) Law Rep. 5 Ch. 86.

in the first place; but the principle of that decision does not extend to payments made by us. Suppose, for example, that £10,000 is due for principal, and £5000 for interest, and that a dividend of £3000 is received from the *Contract Corporation*, then we admit that that must be applied to reduce the interest to £2000. Then, suppose that afterwards we pay a dividend of £3000, we say that that must be applied in reducing the principal to £7000.

Sir *Richard Baggallay*, Q.C., and Mr. *Langley*, for the *Warrant Finance Company*:—

In the *Warrant Finance Company's Case* (1) it was decided that dividends are only to be paid on what is due for principal and interest at the commencement of the winding-up, and that no creditor is to receive any subsequent interest until all the creditors have been paid 20*s.* in the pound. But in the *Warrant Finance Company's Case* (2) the Lord Justice says that that is simply a convenient rule for the administration of the assets in the winding-up, and is not meant to interfere with the rights of the creditors; consequently, no creditor can be required to part with any security which he may possess until he has been paid his principal, interest, and costs in full. But that is precisely what the liquidator of the *Joint Stock Discount Company* is here seeking to do. He makes out his balance by appropriating the dividends, amounting to 10*s.* in the pound, paid before November, 1867, to principal only; but that is an appropriation simply for the convenience of the Court, and not such as to deprive the creditor of his right to appropriate the payment in any way he thinks most beneficial, according to the principle laid down in *Bower* v. *Marris* (3). We contend that, before these bills are taken out of our hands, we must have paid to us a balance calculated on the principle of applying the first four dividends of the *Joint Stock Discount Company* in reduction, first of interest, and then of principal.

Mr. *Chitty*, for the liquidator of the *Contract Corporation*, took no part in the argument.

(1) Law Rep. 4 Ch. 643. (2) Law Rep. 5 Ch. 86.
(3) Cr. & Ph. 351.

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WARRANT FINANCE COMPANY'S CASE. (No. 2.)

Mr. *Jessel*, in reply:—

In *Bower* v. *Marris* (1) there was no question of appropriation of payments such as there is here. All that was decided was that, as between the obligee on a bond and the solvent obligor, dividends received from the estate of the bankrupt co-obligor were applicable in reduction of interest; but nothing was decided as to the application of these dividends as between the obligee and the bankrupt obligor, which is the point in this case.

LORD ROMILLY, M.R.:—

I am very clear as to the principle on which this case is to be decided. I treat the case as if there were no winding-up at all, and these sums had been paid simply on account. Then, when the *Joint Stock Discount Company* has paid what is due for principal, interest, and costs, and not till then, will that company be entitled to these securities. That I take to be what the Lord Justice decided in the former case, and it is unnecessary to go into any of those questions as to appropriation of payments, which are often extremely difficult.

Therefore I am of opinion that the *Joint Stock Discount Company* cannot be entitled to the benefit of any remedy they may have on these bills against the *Contract Corporation* until the *Warrant Finance Company* has received principal, interest, and costs in full.

Solicitors: Messrs. *Lawrance, Plews, Boyer, & Baker;* Messrs. *Flux, Argles, & Rawlins;* Messrs. *Linklaters, Hackwood, & Addison.*

(1) Cr. & Ph. 351.

SWIFT *v.* WENMAN.

M. R.
1870
Feb. 15.

Marriage Articles—Husband's Adultery—Dissolution of Marriage—Subsequent Suit by Wife for Payment of Trust Fund.

Under marriage articles, the personal property of the wife, who was then an infant, was agreed to be settled upon the usual trusts, with an ultimate trust for the wife absolutely, if she survived. No settlement was executed on the wife's attaining twenty-one. There were no children of the marriage. A decree for dissolution of the marriage was made by the Divorce Court on the suit of the wife. The wife filed her bill against her late husband and the trustee of the marriage articles for payment of the trust fund:—

Held, that she was entitled to have the trust fund paid to her.

14 Eq 422
1 Ch D. 565,
574
2 Ch D. 319

THE Plaintiff in this suit, who had obtained a decree for dissolution of marriage in the Divorce Court against the Defendant *Swift*, on account of adultery and bigamy, filed her bill to obtain payment of a trust fund to which, under her marriage articles, she would have become absolutely entitled on the death of her husband.

The Plaintiff, who was entitled under her father's will to a share of his personal property on attaining the age of twenty-one, married the Defendant *Swift*, while still an infant, in the year 1843; and marriage articles were then entered into, under which it was agreed that her share under the will should be vested in trustees upon trust for herself for life, with remainder for her husband for life, and, in default of children, if her husband should die in her lifetime, for the Plaintiff absolutely; but if the husband should survive, then as the Plaintiff should by will appoint, and in default of appointment for the Plaintiff's next of kin.

The Plaintiff attained twenty-one in 1845, but did not execute any settlement in pursuance of the articles.

There were no children of the marriage.

In 1854 the Plaintiff was deserted by her husband, who went to *Australia* and there married another person; whereupon the Plaintiff took proceedings in the Divorce Court, and in 1868 obtained a decree for dissolution of the marriage.

The bill was filed against the surviving trustee and the former husband, and prayed that, notwithstanding the marriage articles, the Plaintiff might be declared to be entitled to the trust fund, and that the same might be paid to her accordingly.

Not followed Fitzgerald v Chapman 1 Ch D. 565. 574

M. R. 1870 SWIFT v. WENMAN.

Mr. *Roxburgh*, Q.C., and Mr. *T. A. Roberts*, for the Plaintiff:—

The relief sought by the Plaintiff in this suit could not have been obtained by any proceeding in the Divorce Court under 22 & 23 Vict. c. 61, s. 5, as there were no children of the marriage.

The Plaintiff not having assented to the marriage articles on her attaining twenty-one, they are no longer binding upon her, and she is entitled to set them aside; but, assuming that they are binding, we submit that she is now entitled to her share in the trust fund just as if her husband had died in her lifetime. In *Wells* v. *Malbon* (1), where a married woman was entitled to a share of residue, and before it was received she had obtained a decree for dissolution of her marriage on account of her husband's adultery, she was held to be entitled to the fund. In *Wilkinson* v. *Gibson* (2) a decree of dissolution had been made by the Divorce Court on the suit of the wife, she being at the date of the decree entitled to a reversionary interest in a sum of stock, which was the subject of a post-nuptial settlement, and which fell into possession after the decree. The divorced wife took proceedings to realize the fund, and died before it was recovered. It was there held that her executors were entitled to the fund. On the same principles we submit that the Plaintiff is now entitled to payment of the trust fund.

Mr. *Bardswell*, for the trustee.

Mr. *C. Howard*, for the husband, contended that the marriage articles could not be set aside, and referred to *Milford* v. *Milford* (3).

LORD ROMILLY, M.R., considered that the husband had no interest in the trust fund, and made a decree according to the prayer of the bill.

Solicitor for the Plaintiff: Mr. *R. W. Roberts*, agent for Mr. *R. Woof, Worcester.*

Solicitors for the Defendants: Mr. *J. T. Fry*; Messrs. *Sharpe, Parkers, & Pritchard.*

(1) 31 Beav. 48. (2) Law Rep. 4 Eq. 162.
(3) Law Rep. 2 P. & D. 715.

PEACOCK *v.* EASTLAND.

M. R.

1870

March 4, 6; *April* 26.

Estate tail—Disentailing Deed—Grant—Statute of Uses—Disclaimer by Grantees.

M., a tenant in tail in possession of an estate, executed a disentailing deed, purporting to be a grant of the estate to *A.* and *B.* and their heirs, free from all estates tail of the grantor, to the use of *A.* and *B.* and their heirs upon trust for the grantor. The deed was inrolled but not executed by *A.* and *B.*, who subsequently executed a deed of disclaimer :—

Held, that the disentailing deed operated as a grant and not by the *Statute of Uses;* that it was rendered inoperative by the subsequent disclaimer by the grantees; and that the estate tail of *M.* was not barred under 3 & 4 Will. 4, c. 74.

8 Cl. & D. 631
21 L. J. Ch. 282

THIS was a suit by vendors for specific performance, the question of title which was raised on the face of the bill being whether, in the circumstances of the case, an estate tail vested in their testator had been barred.

By an indenture dated the 15th day of November, 1866, *M. P. Moore*, who was tenant in tail in possession of a share in certain real estates, granted to *E. Moore* and *J. H. Marsden* and their heirs the share in question, to hold the same to them and their heirs, freed and discharged from all estates tail of *M. P. Moore*, and all remainders, &c., to take effect after the determination or in defeazance of such estates tail or any of them, to the use of *E. Moore* and *J. H. Marsden*, their heirs and assigns, upon trust to sell the same in manner therein mentioned, and stand possessed of the proceeds in trust for *M. P. Moore* the grantor, his executors, administrators, and assigns.

This deed was duly inrolled as a disentailing assurance, but was not executed by either of the grantees.

M. P. Moore died on the 25th of November, 1866, having previously made his will, dated 18th of August, 1866, by which he gave all his real and personal estate (except estates vested in him as a trustee or mortgagee) to the Plaintiff, *Sophia Peacock*, absolutely, and appointed her and the Plaintiff *H. Peake* his executors, and devised to them all estates vested in him as trustee or mortgagee.

By a deed-poll dated the 9th of April, 1867, under the hands and seals of *E. Moore* and *J. H. Marsden*, reciting the indenture of the 15th of November, 1866, and reciting that *E. Moore* and

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J. H. Marsden never executed the same indenture, nor had they, or either of them, ever accepted or acted in the trusts reposed in them by the same indenture, but, on the contrary, they had wholly declined to act therein, and were desirous to make and execute the disclaimer in the now stating deed-poll contained, it was witnessed that they, *E. Moore* and *J. H. Marsden*, had renounced and disclaimed all the messuages, &c., by the said indenture granted or otherwise assured or expressed or intended so to be, with their and every of their appurtenances, and all the estate, right, title, interest, inheritance, uses, trusts, powers, and authorities whatsoever by the said indenture expressed to be given or declared to or concerning the said *E. Moore* and *J. H. Marsden* or either of them.

The Defendants, who had agreed to purchase from the Plaintiffs, *S. Peacock* and *H. Peake*, the testator's share in part of the property, his one-fourth of which was comprised in the deed of the 15th of November, 1866, took the objection that this deed was wholly defeated by the disclaimer, and was inoperative as a disentailing assurance, in which case it was admitted that the Plaintiffs could not make a title.

Mr. *Jessel*, Q.C., and Mr. *H. Cadman Jones*, for the Plaintiffs:—

E. Moore and *Marsden* were parties to the deed of November, 1866, in two capacities: as grantees to uses and as *cestuis que use*. They could disclaim the use, but we say that they could not disclaim the instantaneous seisin which they took as releasees to uses: *Hanbury Jones* on Uses (1); *Cruise*, Dig. (2); *Gorton's Case* (3); *Sug. Gilb.* on Uses (4); *Sugden* on Powers (5); *Sanders'* Uses and Trusts (6); *Bacon*, Law Tracts (7). This is in accordance, not only with convenience, but with technical rules; for the legal estate passed at once to the grantees to uses without their assenting: *Thompson* v. *Leach* (8); *Sheppard's* Touchstone (9). It has passed through them, and served the use, which if defeated by the disclaimer must be defeated by relation; but the doctrine of relation, which is only applied "of necessity," *ut res magis valeat*

(1) Page 99.
(2) 4th Ed. Vol. iv. p. 131.
(3) 2 Roll. Abr. 787.
(4) Page 224, n. 2.
(5) 8th Ed. preface, and p. 11.
(6) 5th Ed. p. 85, n. 2.
(7) Page 348.
(8) 2 Vent. 198.
(9) Page 285.

quam pereat, or "to advance a right" (*Butler and Baker's Case* (1), *Menvil's Case* (2)), cannot be applied in such a case. The use, therefore, on the disclaimer, resulted to the settlor in fee.

Then, further, we contend that, on the construction of the disclaimer, there was no intention to disclaim the seisin but only the use. If the Court be against us on both points, we say that still this was a good disentailing assurance within the terms of 3 & 4 Will. 4, c. 74, s. 40, as being an assurance by which the tenant in tail "could have made the dispositions." It is, moreover, a disposition in equity by reason of the declaration of trust.

Mr. *Charles Hall*, for the Defendants:—

The question whether a releasee to uses can disclaim a momentary seisin does not arise in the present case; for though the Plaintiff's case has been argued as if it depended upon the *Statute of Uses*, the deed of the 15th of May, 1866, was in reality a simple common law grant, the grantees being the same persons as those who are to have the use; so that it is to be construed in the same way as it would have been before the *Statute of Uses*: Cases and Opinions (3), *Jenkins* v. *Young* (4); *Hayes'* Conveyancing (5); *Doe* v. *Passingham* (6); and *Gorman* v. *Byrne* (7). On these authorities I contend that the deed would operate as a common law grant; and the estate of the grantees cannot be affected by the trust for sale, for that creates an equity to which this Court could give effect, but it cannot alter the legal estate.

This being so, the question arises as to the effect of the disclaimer by the grantees. It has been contended that a disclaimer cannot relate back.

In *Butler and Baker's Case*, if it is an authority at all for the present purpose, the *dicta* are in favour of the defendant's contention, and the same may be said of *Menvil's Case* (8). *Thompson* v. *Leach* (9) only decided that the presumption is in favour of an estate being in the grantee until the contrary is shewn.

The effect of disclaimer is clearly stated in *Sheppard's* Touch-

(1) 3 Rep. 28 b.
(2) 13 Rep. 19.
(3) Vol. ii. p. 281.
(4) Cro. Car. 230.
(5) Vol. i. p. 460.
(6) 6 B. & C. 305.
(7) 8 Ir. C. L. Rep. 394.
(8) 13 Rep. 19, 21.
(9) 2 Vent. 198.

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stone (1), where it is said: "The law presumes that every grant is for the benefit of the grantee, and therefore, till the contrary is shewn, supposes an agreement to the grant. From the moment there is evidence of disagreement, then, in construction of law, the grant is void *ab initio*, as if no grant had been made."

2 Ch D 282

The disclaimer, therefore, by *E. Moore* and *J. H. Marsden* was of a common law estate, and its effect was to make the grant to them void *ab initio*: *Townson* v. *Tickell* (2). This being so, the deed is inoperative as a disentailing assurance.

Mr. *Jessel*, in reply.

April 26. LORD ROMILLY, M.R., after stating the facts, continued:—

I am of opinion that the disentailing deed of the 15th of November, 1866, had no operation. It does not appear to me to be a question arising on the *Statute of Uses*, or that the doctrine of *scintilla juris*, as was first argued before me, arises. That question, which was so much and so eagerly discussed by Lord *St. Leonards*, I had always supposed to be settled by the statute passed at the instance of his Lordship for that purpose (23 & 24 Vict. c. 38, s. 7). I think the objection made by Mr. *Charles Hall* is a just one, that the deed on which this question arises, if it is correctly set forth in the bill, is a common law deed, operating by grant and not by the *Statute of Uses*, under which alone could the question arise of whether a releasee to uses can disclaim the momentary seisin which vests before disclaimer.

The real question seems to me to be this: whether, by grant at common law, any man can confer upon another, against his will and without his consent, any estate whatever in any property? Consequently, in my opinion, all the cases which refer to the releasee to uses being a mere conduit-pipe have no application to this case. The releasee to uses is a mere conduit-pipe, because the essence of a conveyance under the *Statute of Uses* is to give the property to one for the use of another.

In the case of *Thompson* v. *Leach* (3) it was expressly held that the estate surrendered did not pass to the surrenderee unless he

(1) Page 285. (2) 3 B. & A. 31. (3) 2 Vent. 198.

accepted it. The only difference that existed between the Judges was this: that Mr. Justice *Ventris*, admitting that principle, thought that in the absence of evidence acceptance must be implied, because it must be supposed to be for the benefit of the surrenderee to accept, and that, therefore, his assent must be implied. But in this instance no question arises from the absence of evidence; it is a grant of the property to *E. Moore* and *J. H. Marsden*, their heirs and assigns, and they have both disclaimed and renounced all interest; consequently the case of *Townson* v. *Tickell* (1), which is conclusive against any estate being vested in a man against his consent, applies.

Lord *Tenterden*, in *Townson* v. *Tickell* (2), said: "The law certainly is not so absurd as to force a man to take an estate against his will. *Prima facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge; and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift."

All the cases to which I have been referred relate to conveyances under the *Statute of Uses*, which, as I have already stated, appear to me to have no application to this case. The question then resolves itself into this: Does the deed, which gave no estate or interest to any one, bar the estate tail of *M. P. Moore* under the *Statute of Fines and Recoveries* for this purpose? I have examined the Act for the abolition of fines and recoveries very carefully, and I cannot find any clause or provision which enables any one to bar an estate tail by a deed which conveys no estate to any one, and is in fact merely the expression of a desire on the part of the tenant in tail to make another a trustee for the sale of the estate, if he would consent, which he has not done. I am of opinion, therefore, that a good title cannot be shewn to the undivided one-fourth part, which belongs to *M. P. Moore*.

Solicitors for the Plaintiff: Messrs. *Taylor, Hoare, & Taylor*, agents for Messrs. *Peake & England, Sleaford*.

Solicitors for the Defendant: Messrs. *Wing & Du Cane*.

(1) 3 B. & A. 31.

(2) 3 B. & A. 36.

V.-C. M.
1870
March 15.

M'GAREL *v.* MOON.

Practice—Pleading—Exceptions—Interrogatory not founded on Specific Allegation.

A Defendant will be required to answer an interrogatory which is pertinent to the case made by the bill, though it is not founded on any specific allegation in the bill, where the Plaintiff has no knowledge on which to found such allegation.

THIS case came on upon exceptions to the answer of the Defendants *Richard Moon*, *Joshua Proctor Brown Westhead*, the *London and North Western Railway Company*, and *Stephen Reay* (the secretary of the company), to the amended bill.

The object of the suit was to obtain the retransfer to the Plaintiff of certain shares in the *Central Wales* and *Central Wales Extension Railway Companies*, which he had transferred to the Defendants *Moon* and *Westhead*, and *Charles Edward Stewart*, now deceased, as nominees of, and trustees for, the *London and North Western Railway Company*, as security for the repayment of £100,000 lent by the *North Western Company*, according to the allegations in the bill, to the *Central Wales Extension Company*, the debt having, according to the allegations in the bill, been extinguished by the amalgamation of the *Central Wales Extension Company* with the *North Western Company*.

The *North Western Company* and their trustees alleged that the loan, though nominally made to the *Central Wales Extension Company*, was really made to the *Neath and Brecon Railway Company*, and that the debt was still subsisting.

The 20th paragraph of the amended bill contained the following allegation:—

"On the 2nd day of August, 1865, the Defendants *Richard Moon* and *Joshua Proctor Brown Westhead*, and the said *Charles Edward Stewart*, as the trustees of the Defendants, the *London and North Western Railway Company*, advanced and paid out of the corporate funds of such company to the Defendant *John Turton Woolley*, as the agent of the *Central Wales Extension Railway Company*, the sum of £50,000."

The 21st paragraph contained a similar allegation as to an advance of £25,000. These sums of £50,000 and £25,000 were part of the £100,000 for the security of the repayment of which the shares were transferred. The bill contained no allegation that the advances had or had not been sanctioned by the shareholders of the *London and North Western Company.*

By the 20th and 21st interrogatories, founded on the 20th and 21st paragraphs of the amended bill, the Defendants were asked whether the advances and payments of the £50,000 and £25,000 were not sanctioned by the directors, or whether or not by the shareholders of the *North Western Company,* as advances to the *Central Wales Extension Company,* or in some other and what manner.

The Defendants, by their answer, admitted that the £50,000 and £25,000 were advanced and paid by *Moon, Westhead,* and *Stewart* as trustees for the *North Western Company* to *Woolley,* but stated that the advances were made to *Woolley,* not as agent for the *Central Wales Extension Company,* but as agent for one *Dickson,* and for the *Neath and Brecon Company.* They also admitted that the advances were made with the sanction of the directors of the *London and North Western Company,* but they omitted to answer whether the advances were sanctioned by the shareholders of that company as an advance to the *Central Wales Extension Company,* or in some other and what manner.

Two of the exceptions were founded on the above omissions in the answer to the 20th and 21st interrogatories. The other exceptions (which were overruled) are not material for the purpose of this report.

Mr. *Methold* (Mr. *Pearson,* Q.C., with him), in support of the exceptions:—

It will be contended that the Defendants cannot be required to answer the interrogatories as to the sanction of the shareholders, because they are not founded on specific allegations in the bill. But under the present practice a specific allegation is not necessary to support an interrogatory which is pertinent to the case made by the bill: *Hudson* v. *Grenfell* (1); *Marsh* v. *Keith* (2); *Daniell's*

(1) 3 Giff. 388. (2) 1 Dr. & Sm. 342.

V.-C. M. 1870 M'Garel v. Moon.

Chancery Practice (1). It is material to the Plaintiff's case that he should know whether or not this transaction was represented to the shareholders and sanctioned by them as a loan to the *Central Wales Extension Railway Company;* he cannot know this except by interrogating the Defendants; and he need not for the purpose of interrogating them insert an imaginary allegation in the bill: *Marsh* v. *Keith.*

Mr. *Bristowe,* Q.C., and Mr. *Speed,* for the Defendants:—

According to the old practice, an interrogatory which is not founded on an allegation in the bill need not be answered: Lord *Redesdale* on Pleading (2); and as a general rule the practice is still the same: *Daniell's* Chancery Practice (3). The rule has been relaxed with reference to interrogatories as to documents, but such interrogatories are now superseded by the ordinary summons for production. In *Marsh* v. *Keith* it was held that in foreclosure suits, where, from the very nature of the case, it is necessary that the Plaintiff should ascertain whether there are other incumbrances in order that he may bring all necessary parties before the Court, he need not allege the existence of other incumbrances in order to found an interrogatory, but that case does not lay down a general rule applicable to all interrogatories. This interrogatory as to the sanction of the shareholders is irrelevant to the suit, and must have been intended to serve some ulterior purpose.

Sir R. Malins, V.C.:—

According to the case made by the amended bill in this suit, it is or may be material to the Plaintiff's case that he should know whether the advance of these sums of money was or was not sanctioned by the shareholders of the *North Western Company* as a loan to the *Central Wales Extension Company.* The Plaintiff has no means of knowing this, and he could not with propriety allege by the bill either way, that it was or was not so sanctioned, as

(1) 4th Ed. p. 663. (2) 5th Ed. p. 53.
(3) 4th Ed. p. 441.

the allegation would of necessity be merely speculative and imaginary. I think that under the modern practice, when an interrogatory relates to a matter which is pertinent and may be material to the case made by the bill, and which the Plaintiff has no means of knowing except by interrogating the Defendant, and when the interrogatory is founded on the general allegations of the bill, the Defendant is bound to answer, although the interrogatory is not founded on a specific allegation. This case is, in my opinion, covered by the decision in *Marsh* v. *Keith* (1). There the suit related to an incumbrance on an estate; it was necessary that the Plaintiff should know, and he had no means of knowing, whether there were other incumbrances; and Vice-Chancellor *Kindersley* held that he was entitled to interrogate the Defendant as to the existence of other incumbrances, without making a fictitious allegation as a foundation for the interrogatory.

I must, therefore, hold that these were proper interrogatories, and ought to have been answered, and that the exceptions must be allowed. I am the more inclined to allow the exceptions, inasmuch as the questions are such as may very easily be answered.

Solicitors for the Plaintiff: Messrs. *Maynard, Son, Markby, & Denton.*

Solicitor for the Defendants: Mr. *Blenkinsop.*

(1) 1 Dr. & Sm. 342.

V.-C. M.
1870
Jan. 13.

STEWART *v.* SANDERSON.

Investment by Trustees—Permanent Securities—Railway Stock.

A testator directed his trustees to lay out and invest £15,000 upon Government real or personal security, or in such stocks, funds, or shares as they might, in their absolute discretion, think fit, and pay the interest to his wife for life; the capital to be for his children.

The trustees, with the sanction of the widow, invested a portion of the money upon railway stock bearing a high rate of interest. Upon her death the securities were greatly reduced in value:—

Held, that the trustees were bound to invest upon securities of a permanent nature; that, in the absence of evidence to the contrary, it must be assumed from the rate of interest that these investments were not permanent; and that the £15,000 must now be invested for the benefit of the children of the testator.

GEORGE GILLESPIE, by his will dated in August, 1862, gave all his real and personal estate to his trustees to sell and convert into money, and call in, realize, or vary any of the securities or investments upon which his moneys might be invested at the time of his death, with power to vary the securities; and the moneys so realized were to form one fund for all the purposes of his will; and the testator bequeathed the same to *Sarah Gillespie* his wife, and *A. Gillespie*, *H. Sanderson*, *A. Gilmour*, and *J. W. Gillespie* his son, upon trust, after payment of his debts, to lay out and invest, or continue invested, the sum of £15,000 in or upon Government, real, or personal security, or in such stocks, funds, or shares as they might in their absolute discretion think fit, and to pay the interest, dividends, and annual income arising therefrom to his wife during her life for her separate use; and, subject to the provisions in favour of his wife, the testator gave the £15,000 in trust for his children upon attaining twenty-one equally. The residue was given to the children in unequal shares, each son taking three-tenths, and each daughter two-tenths. The testator died in the year 1849. The will was proved by *Sarah Gillespie*, *H. Sanderson*, and *J. Sanderson* (who had been added as an executor by a codicil), who realized the personal estate of the testator, and proceeded to carry out the trusts of the will. *J. W. Gillespie* did not

prove, but acted in the trusts. The estate was sufficient to provide the said sum of £15,000 and leave a large surplus. The testator left children, some of whom were still infants.

In March, 1864, an arrangement was entered into between *Sarah Gillespie* and the other executors of the testator, whereby a sum of £15,000 was set apart for the benefit of *Sarah Gillespie* for life; and she agreed to accept the amount so set apart for her provision. A schedule was appended to the deed of arrangement setting out the securities upon which the £15,000 was invested, and including therein £2000 £4½ per Cent. Preference Stock in the *Scottish North Eastern Railway*, £1400 £7 per Cent. Preference Stock in the same railway, £1000 £4½ per Cent. Guaranteed Stock in the *Clydesdale Railway*, besides other ordinary, consolidated, and preference stock of other railways. The whole of these securities, except the £1400 £7 per Cent. Preference Stock mentioned above, formed portions of the personal estate and effects of the testator which had not been converted.

Sarah Gillespie died on the 11th of January, 1869, and appointed the Defendants *J. W.* and *Hugh Gillespie* her executors. The shares and securities mentioned in the schedule to the memorandum of agreement had since become considerably depreciated in value, and were now of much less value than £15,000.

Under these circumstances questions had arisen between the parties as to whether the said securities were to be deemed to have been absolutely appropriated to answer the £15,000, or whether such sum of £15,000 ought now to be set apart, and duly invested to answer the trusts of the will.

The bill was filed by a married daughter, an infant, and prayed that it might be declared that the Defendants *Hugh* and *John Sanderson* and *J. W. Gillespie* ought to set apart and invest the sum of £15,000 upon Government or real securities to be held by them upon the trusts of the will.

There was no evidence before the Court whether the railway and other shares were permanent or terminable in their character; but the Vice-Chancellor said he should assume that some of them, at all events, were of a terminable nature, and that a higher interest was on that account receivable by the tenant for life to the prejudice of the interests of remaindermen.

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Mr. *Ince*, for the Plaintiff:—

The arrangement made between the tenant for life and the trustees must be considered as temporary only, and for the purpose of increasing the income of the tenant for life; but the infants cannot be bound by any investment which is not of a permanent character.

Mr. *Bardswell*, for an infant daughter.

Mr. *C. Hall*, for the trustees:—

The power given to the trustees by the will entitled them to invest the £15,000 upon any securities they thought fit. Some of these shares were held by the testator at the time of his death, and the trustees were justified in purchasing other securities of a similar nature. The sum ordered to be set apart was formally appropriated for that purpose by deed, and this was sanctioned by the tenant for life. The trustees committed no breach of trust, and only acted in pursuance of the power vested in them; and they cannot be made responsible for any diminution in the value of the securities.

SIR R. MALINS, V.C.:—

I am of opinion that this is not such an appropriation of the funds as that it can bind the infants. It is true that the trustees have a wide discretion given them by the will, since they may invest the money in Government, real, or personal security, or in such stocks, funds, or shares as they may, in their absolute discretion, think fit. But the doctrine of the Court is, that any appropriation of funds, the interest of which is given to a person for life and the capital to remaindermen, must be in securities of a permanent character. An appropriation in £3 per Cent. Stock would consequently be perfectly good, but not so if the investments should be made in any Government stock which is liable to be reduced at a given period. The trustees have ample power to invest as they think fit, but that does not enable them to invest upon securities which, at the time, are commanding a higher rate of interest in consequence of their being determinable. I think these trustees acted in perfect good faith; their object was to get

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as large an income for the tenant for life as they could obtain, and what they did was with the full sanction and at the request of the tenant for life, who agreed to accept the shares set forth in the schedule to the agreement as the provision set apart for her. But I find that some of these securities comprise preference railway stock, with an interest of £7 per cent. and £4½ per cent. guaranteed. Now it is evident that these investments could not be permanent stock, and that their value is liable to fall considerably. This has already been the case with some of the securities, and in my opinion this is not an appropriation which can bind the infants. It could only be valid as between the trustees and the tenant for life.

There must, consequently, be an appropriation of such an amount of property as will satisfy the words of the will, and give a clear sum of £15,000 to the children who are entitled after the tenant for life. It will make but little difference, as it will come out of the residue, which is left nearly in the same way.

Minutes:—Declare that there has not been a sufficient appropriation of the £15,000, and that the trustees are bound to make a proper appropriation of that sum, or equivalent securities.

Solicitors for all Parties: Messrs. *Chester & Urquhart.*

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1870
Feb. 14, 15, 22.

Construction of Will—Name or Description.

A testator devised certain freehold property to trustees to the use of his son *George Gillett* for life, and after his decease to the use of "*Robert Gillett*, the fourth son of *George Gillett*," in fee, in case he should attain twenty-one; but if he should die under that age, to the use of the fifth son in fee, and if he should die under twenty-one, to the first son coming after the fifth who should attain twenty-one. *Robert H. Gillett* was the third, and *John William Gillett* was the fourth, son of *George Gillett*, who had seven sons. There were reasons apparent from the evidence why the testator passed over the first and second sons, but none for omitting the third son:—

Held, that the name must prevail over the description, and that *Robert H. Gillett*, the third son, took under the above devise.

GEORGE GILLETT, by his will, dated the 1st of February, 1859, gave, devised, and bequeathed certain freehold messuages,

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farms, lands, and hereditaments to two trustees, their heirs and assigns, to the use of the said trustees, their executors, administrators, and assigns, for twenty-one years from the day of his decease, upon the trusts thereinafter expressed, and subject thereto, to the use of his son *George Henry Gillett* and his assigns for and during his natural life, and from and immediately after his decease to the use of *Robert Gillett*, the fourth son of the said *George Henry Gillett*, his heirs and assigns for ever, in case he, the said *Robert Gillett*, should attain the age of twenty-one years; but if he should die under that age then to the use of ——, the fifth son of the said *George Henry Gillett*, his heirs and assigns for ever, in case such fifth son should attain the age of twenty-one years; but if he should die under that age, then to such other son of the said *George Henry Gillett* who, coming after the said fifth son in birth, should first attain the age of twenty-one years, and in default of any such younger son attaining such age of twenty-one years, then to the use of the said *George Henry Gillett*, his heirs and assigns, absolutely.

The testator died in April, 1861. His son *George Henry Gillett*, the Plaintiff, had had eleven children, seven of whom were sons. The Defendant *Robert Henry Gillett* was the third son of the Plaintiff, but claimed to be the person named in the will of the testator as *Robert* the fourth son of the said *George Henry Gillett*. The Defendant *John William Gillett* was the fourth son of *George Henry Gillett*, and claimed to be entitled to the estate and interest given by the will to the fourth son of *George Henry Gillett*. The Defendants *Robert Henry Gillett* and *John William Gillett*, who were both infants at the time of the filing of the bill, had since attained the age of twenty-one years.

The bill was filed for the administration of the estate of the testator, and for an account; and the question was now raised whether *Robert Henry Gillett*, the third son, or *John William Gillett*, the fourth son of *George Henry Gillett*, was entitled to the estate devised to the use of *Robert Gillett*, the fourth son of *George Henry Gillett*.

Mr. *Cotton*, Q.C., and Mr. *Hastings*, for *Robert Henry Gillett*:—

The question is, whether the inaccurate name, or inaccurate

description, is to prevail in this case. The devise is to *Robert Gillett*, the fourth son of *George Henry Gillett*, when, in fact, *Robert Gillett*, or *Robert Henry Gillett*, was the third son, and *John William Gillett* was the fourth son. If *Robert* takes, he will take the feesimple absolutely, because he has now attained twenty-one, and the other sons will be excluded. An affidavit has been made by the solicitor who prepared the will, giving an explanation of the circumstances under which the will was drawn, and the instructions received by him; but, after the decisions in *Doe* v. *Hiscocks* (1) and *Bernasconi* v. *Atkinson* (2), the affidavit cannot be received. It is, in this case, much more probable that the testator had forgotten whether *Robert* was the third or the fourth son than that he had mistaken the name. There is evidence to shew that the testator had reasons, which were probably sufficient in his mind, for excluding the first and second of his grandsons, but there is no reason given for his excluding the third son. The decision in *Newbolt* v. *Pryce* (3) governs this case, where the gift was to *John Newbolt*, second son of *William Strangways Newbolt*. The second son was *Henry Robert* and the third son was *John Pryce Newbolt*, and it was held that the name, and not the description, should prevail, and that *John Pryce* was entitled to the legacy. In *Doe* v. *Hiscocks* the devise was to the testator's grandson *John Hiscocks*, eldest son of *John Hiscocks*. The eldest son was *Simon*, but it was held that *John*, who was the eldest son by a second marriage, was entitled. In *Adams* v. *Jones* (4) the description prevailed over the name, but there the intention was palpable, as the gift was to *Clare Hannah Adams*, the wife of *Thomas Adams*. The wife's name was *Hannah*, but *Thomas Adams* had an infant daughter, only two years old, named *Clare Hannah*, and it was evident that the testator could not have meant the child when he said the wife, and one of the names was correct, so the wife was held to be entitled. In *Bernasconi* v. *Atkinson* the name was held to govern the construction rather than the description.

[They also cited *Hart* v. *Tulk* (5), where "the fourth schedule" was held to mean "the fifth schedule," upon consideration of all

(1) 5 M. & W. 363.
(2) 10 Hare, 345.
(3) 14 Sim. 354.
(4) 9 Hare, 485.
(5) 2 D. M. & G. 300.

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the provisions of the will, and the state of the testator's property.]

Mr. *De Gex*, Q.C., and Mr. *Edward Ford*, for the fourth son, *John William Gillett*:—

There is no evidence in this case to shew that the testator would have preferred *Robert Henry* to *John William*, for he did not personally know either one or the other, although there might have been ground for his passing over the first and second sons. There are cases in which it has been held that the description will prevail over the name, as in *Lord Camoys* v. *Blundell* (1), where the devise was to the second son of *Edward Weld* of *Lulworth*, and there was no *Edward Weld* of *Lulworth*, but *Joseph Weld* was the owner of *Lulworth*. There was, however, a sister of *Edward Weld* who had a son named *Edward*, and a second son called *Thomas Weld*, and it was held that the description of the unnamed devisee was to guide the decision, and that *Thomas Weld*, the second son, took. In *Drake* v. *Drake* (2) the devise was "to my niece *Mary Frances*;" the testator had no niece who bore those two names conjointly, but he had nieces who bore one or other of those names. An affidavit of the solicitor to shew what was the state of the family was not admitted, and the gift was held to be void for uncertainty. In *Doe* v. *Huthwaite* (3), where there was a question whether the name or description was to prevail, it was held that evidence of the state of the testator's family and other circumstances was admissible to shew whether the testator had mistaken the name of the devisee, or whether the mistake was in the description. In *Bradshaw* v. *Bradshaw* (4) evidence of intention was admitted, and it was held distinctly that the description should prevail over the name; and in *Jarman* on Wills (5) it is laid down that a testator's declarations are admissible to shew which of the imperfectly described persons are those he intended to be the object of the gift. We contend that the testator in this case meant to exclude the third son under any circumstances, and to begin with the fourth son, and then to go on with the fifth and sixth sons.

(1) 1 H. L. C. 778.
(2) 8 H. L. C. 172.
(3) 3 B. & A. 632.
(4) 2 Y. & C. Ex. 72.
(5) 3rd Ed. p. 407.

Mr. *Pearson*, Q.C., Mr. *Morgan*, Q.C., and Mr. *Wickens*, appeared for the trustees.

Mr. *Osborne*, Q.C., and Mr. *Charles*, for the Plaintiff.

Mr. *Cotton*, in reply, cited *Jarman* on Wills (1), and *Bradshaw* v. *Bradshaw* (2).

Feb. 22. SIR R. MALINS, V.C.:—

The Defendant *Robert Henry Gillett* is the third son of the testator's son, and the Defendant *John William Gillett* is the fourth son. The question to be decided is, whether *Robert Henry* or *John William* takes under this devise. No question was raised, or could possibly be raised, that *Robert Henry* would take under the name of *Robert* only, if there was no other difficulty in his way. The real question is, whether the testator has mistaken the name or the description of the devisee. If this had been a simple devise to *Robert* the fourth son, not followed by limitations over to the younger sons of the testator, then the case would, in my opinion, have been free from difficulty; the maxim "*Veritas nominis tollit errorem demonstrationis*" would have applied, and *Robert* would have taken. The case of *Newbolt* v. *Pryce* (3) is a distinct authority on this point.

The strong inclination of the Court to adhere to the name rather than to the description of the devisee or legatee is shewn by the case of *Bernasconi* v. *Atkinson* (4), where, under a gift by a testator to his first-cousin *Vincent Bernasconi*, the son of his late uncle *Peter Bernasconi*, the present Lord Chancellor (when Vice-Chancellor) decided that *George Vincent Bernasconi*, the son of a deceased uncle of the testator named *Joseph*, took, on the ground that the testator was mistaken in the description rather than in the name of the legatee, and also upon evidence that *George Vincent Bernasconi* frequently visited and dined with the testator, who usually called him *Vincent*. *Adams* v. *Jones* (5) is a case in which the description prevailed over the name. The bequest was

(1) 3rd Ed. p. 363.
(2) 2 Y. & C. Ex. 72.
(3) 14 Sim. 354.
(4) 10 Hare, 345.
(5) 9 Hare, 485.

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to *Clare Hannah Adams*, the wife of *Thomas Adams;* the wife of *Thomas Adams* was named *Hannah* only, but he had an infant daughter, aged two years, whose name was *Clare Hannah*. The Vice-Chancellor *Turner* decided that the wife took. That case has clearly no application to the present, where one son was as likely to be the object of the testator's bounty as the other. *Bradshaw* v. *Bradshaw* (1), which was much relied upon by Mr. *De Gex* as counsel for the fourth son, is another case in which the description prevailed over the name. There the devise was to *Robert Blagrove Bradshaw*, the *second* son of the testator's daughter. *Robert Blagrove* was, in truth, the eldest son of the daughter, and it was held by Lord *Abinger* that the second son took as well, by the intention of the testator, to be collected from the face of the will, to provide for the second son of his daughter, as by the parol evidence of intention which he admitted. In the present case an affidavit of the Plaintiff, the son of the testator, which was read without objection, shews a motive on the part of the testator for passing over the first and second sons of the Plaintiff, but does not shew any motive for passing over the third son. Apart, therefore, from any difficulty caused by the subsequent limitations over to the fifth son of the son of the testator, and to the sixth and other younger sons, I think it quite clear that *Robert*, the third son, is entitled, though the testator mistakenly calls him the fourth son.

Although on the argument of the case I thought these subsequent limitations over caused some difficulty, upon further consideration I do not think they do. If, as I am bound to conclude, *Robert* was the son intended to take, and the testator erroneously considered him to be the fourth son, and the intention was that if he died under twenty-one the estate should go to the next son in order of birth, the same error which led to *Robert's* being called the fourth son would necessarily lead to the next brother being called the fifth.

The true effect of the will is, therefore, in my opinion, to give the estate to *Robert* the third son, with a series of executory devises over to the younger sons in succession if *Robert*, or those succeeding him, should die under twenty-one.

(1) 2 Y. & C. Ex. 72.

The result is, that as *Robert* has attained his majority, the absolute feesimple has vested in him, and there must be a declaration accordingly.

The cases of *Doe* v. *Huthwaite* (1) and *Doe* v. *Hiscocks* (2), which were cited upon the argument, turned upon the admissibility of parol evidence for the purpose of ascertaining the intentions of the testators, and cannot therefore influence the decision of this case, which I decide without any regard whatever to such parol evidence.

Solicitors for *John William Gillett*: Messrs. *Underwood & Coleman.*

Solicitors for the Defendants: Messrs. *Wood, Street, & Hayter.*

(1) 3 B. & A. 632. (2) 5 M. & W. 363.

V.-C. J.
1870
March 28.

In re WATSON'S TRUSTS.

Will—Construction—Vesting—Bequest referring to Death with Words of Contingency.

Bequest to *A.* for life, and after the death of *A.*, then if *A.* shall "leave issue," upon trust to transfer the share of *A.* to "such" issue equally if more than one when and so often as they shall severally and respectively attain twenty-one, with a trust for maintenance in the meantime; and in case of the death of *A.* "leaving no issue," or if *A.* should happen to "leave issue," then upon the death of "such" issue under twenty-one, over:—

Held, that the contingency of surviving *A.* was part of the gift to *A.*'s issue, and that therefore three children of *A.* who attained twenty-one, but died in her lifetime, took nothing; but that one child who alone survived *A.* took the whole.

Bryden v. *Willett* (1) observed upon; *Sheffield* v. *Kennett* (2) followed.

BY his will, dated the 28th of September, 1812, and made shortly before his death, *W. Watson* bequeathed the residue of his personal estate to trustees upon trust to invest and pay the dividends between his two daughters in equal proportions, "and after the death of my said daughters, then upon trust, if my said daughters or either of them shall leave issue of their body or bodies lawfully to be begotten, to pay or transfer the part or share of such deceased daughter or daughters unto such her or their issue share and share alike, if more than one, when and so often as they shall severally and respectively attain their several and respective ages of twenty-one, and to pay and apply the dividends, &c., thereof in the meantime for their respective maintenance, and if but one child then to such one child, but in case of the death of either of my said daughters leaving no issue, or if she should happen to leave issue, then upon the death of such issue under twenty-one"—over.

One of the testator's daughters, Mrs. *Barker*, died in December, 1869, having had four children, all of whom attained twenty-one. Three of these died before her; the fourth, who alone survived her, was *Maria Barker*. The present trustee having paid into Court a moiety of the funds representing the residue of testator's personal estate, under the *Trustee Relief Act*, *Maria Barker*

(1) Law Rep. 7 Eq. 472. (2) 4 De G. & J. 593.

now presented a Petition praying that the rights of the parties interested in the funds might be declared.

The question was, whether the gift was to all the children of Mrs. *Barker* who attained twenty-one, or only to such as complied with the condition of surviving their mother, the tenant for life.

Mr. *W. B. Heath*, for the Petitioner:—

On the death of her mother the Petitioner became entitled to the whole fund.

The words "if my daughters shall leave issue," mean, "shall at their death leave issue." This is the natural and primary meaning of the word "leave," which is uncontrolled by anything in the present context, and the gift is to such issue, not issue generally. The words of contingency are, therefore, part of the gift: hence no one can take who has not complied with the condition of being alive at the decease of Mrs. *Barker*. *Sheffield* v. *Kennett* (1) is precisely in point. So also is *Bythesea* v. *Bythesea* (2), in which the gift was held contingent, although the word "such" did not occur, and which, therefore, is not so strong a case as the present. Cases like *Maitland* v. *Chalie* (3), in which there was an original gift to children or issue of *A.*, with a divesting clause if *A.* should die without leaving issue, have no application to this bequest, in which the original gift contains the words of contingency: *Jarman* on Wills (4). It is possible that the other side may rely on *Bryden* v. *Willett* (5), in which Vice-Chancellor *Malins* expressed disapproval of *Sheffield* v. *Kennett*, and declined to follow it, because the report contained no reasons by the Lords Justices for their judgment. In this conflict of authority, however, *Sheffield* v. *Kennett* ought to be followed, as being decided by a Court of higher jurisdiction. Besides, the only reason given by Vice-Chancellor *Malins* for his decision was, that he considered that the words "without leaving issue" meant "without having had issue," whereas that is only true of particular cases controlled by the context.

Mr. *Fry*, Q.C., and Mr. *B. B. Rogers*, for the *Equitable Rever-*

(1) 27 Beav. 207; 4 De G. & J. 593.
(2) 23 L. J. (Ch.) 1004.
(3) 6 Madd. 243.
(4) 3rd Ed. Vol. ii. p. 749.
(5) Law Rep. 7 Eq. 472.

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sionary Society, which had purchased part of the Petitioner's interest, supported the same view.

Mr. *Eddis*, Q.C., and Mr. *W. G. Phillimore*, for the legal personal representative of two of the deceased children:—

All the children having attained twenty-one took absolutely vested interests.

In *Woodcock* v. *Duke of Dorset* (1), where the gift was after the death of a tenant for life "leaving" issue, to "such" issue, the Court got rid of the word "such"—so strong was the leaning of the Court to a construction by which all the children should take.

[The VICE-CHANCELLOR:—That was the case of a settlement which recited a desire to provide for children. The Court, treating settlements as being by their nature expressly intended to provide for the children of the marriage, has construed expressions of this nature contained in them differently from similar expressions in wills, which are matters of bounty.]

Boulton v. *Beard* (2), which is a case upon a will, establishes that where there is a gift over on the death of a tenant for life leaving no issue, yet if any child survive the parent the interest of all will be preserved; and that is the case here.

[The VICE-CHANCELLOR:—In that case the gift is in case *A.* shall leave a child or children, then to *A.'s* child or children generally, with a gift over if *A.* shall leave no child. There was, therefore, a gift to all the children, subject to a condition, which was complied with, that at least one shall outlive the tenant for life. Here, however, the gift is not to all the children, but only to such as Mrs. *Barker* shall leave.]

This case cannot be distinguished from *Bryden* v. *Willett* (3), which is an express authority in our favour. The presumable intention of the testator must be taken to be to benefit all his children who should attain twenty-one, and not to deprive them of their interest because they happen to die before the tenant for life.

(1) 3 Bro. C. C. 569. (2) 3 D. M. & G. 608.
(3) Law Rep. 7 Eq. 472.

SIR W. M. JAMES, V.C.:—

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Bythesea v. *Bythesea* (1) and *Sheffield* v. *Kennett* (2) are cases in point. It is clear that the testator has made the condition that the children should outlive the tenant for life part of the gift itself; it is not a mere condition divesting a prior gift.

Possibly this construction may here, as in many cases, bring about a result different to what a testator would wish, but I am not at liberty to make a will for a testator. I will take this opportunity of saying that I cannot agree with what Vice-Chancellor *Malins* says in *Bryden* v. *Willett* (3), that the word "leaving" means "having" or "having had" issue. I think it would astonish a testator if he were told that this Court would place such an interpretation on the word "leaving." The whole fund is, therefore, payable to the Petitioner, or the persons who derive title through her.

Solicitors: Mr. *C. M. Barker;* Messrs. *Clayton & Son.*

In re LANGDALE'S SETTLEMENT TRUSTS.

V.-C. J.
1870
May 7.

Settlement—Investment of Trust Moneys—Securities of a Foreign Country—Bonds of French Railway Company.

Under a settlement the trustees were empowered to invest the trust funds in the "bonds, debentures, or other securities, or the stocks or funds of any colony or foreign country." The question arose whether they could properly invest in the bonds of a French railway company the payment of the capital on which within fifty years was secured by a sinking fund guaranteed, together with interest in the meantime, by the Imperial Government:—

Held, that these bonds were not "securities of a foreign country" within the meaning of the trust for investment.

THIS was a Petition by the trustees of a marriage settlement and the tenants for life, for the decision of the Court on the question whether certain obligations or bonds of the *Compagnie des chemins de fer du Midi* were securities of a foreign country within the meaning of the trust for investment.

(1) 23 L. J. (Ch.) 1004. (2) 4 De G. & J. 593.
(3) Law Rep. 7 Eq. 472.

V.-C. J. 1870 *In re* LANGDALE'S SETTLEMENT TRUSTS.

Under the settlement the trustees were empowered, with the consent of the tenants for life, to call in the trust fund, then invested on mortgage security, and to reinvest "in the Parliamentary stocks or public funds of *Great Britain*, or Bank stock, or *India* stock, or the shares or stock of any railway companies or dock company, or other company established or incorporated by Act of Parliament or by Royal Charter for any public purpose, or at interest in or upon Government or real securities, or in or upon *East India* bonds or debentures or preference stock, or debentures of any railway or dock company, or such other company as aforesaid, or in the purchase of or in or upon the bonds, debentures, or other securities, or the stocks or funds of any colony or foreign country."

By conventions, made and authorized by the French Government, the railways referred to in the Petition were leased to the *Compagnie des chemins de fer du Midi*, and the payment within fifty years of the capital expended on the lines was guaranteed by an "amortisation" or sinking fund; and interest in the meantime at 4 per cent. per annum was also guaranteed, and the guarantees were made a charge on the treasury of *France*.

The conventions were approved in the following manner: by a resolution of the Corps Législatif of *France*, by a minute or resolution of the Senate of *France*, by a law of the Emperor sanctioning and promulgating the said Acts of the Corps Législatif and the Senate, and by an Imperial decree approving of the conventions, and charging the Secretary of State for Agriculture, Trade, and Public Works with its execution.

The *Compagnie des chemins de fer du Midi* had raised a large part of its capital by the issue of obligations or bonds under the authority of the Secretary of State for Agriculture, Trade, and Public Works, bearing interest, and secured in preference to the shareholders upon the products of the railways and upon the aforesaid guarantees.

The Petitioners submitted to the Court whether the said obligations or bonds were "securities of a foreign country" within the meaning of the trust for investment contained in the settlement, and whether it would be proper for the trustees to invest the trust funds in question in such obligations.

Mr. *Snape*, for the Petitioners, referred to *Burnie* v. *Getting* (1), *Brown* v. *Brown* (2), and *Ellis* v. *Eden* (3).

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In re LANGDALE'S SETTLEMENT TRUSTS.

SIR W. M. JAMES, V.C., considered that these obligations were not securities of a foreign country, and therefore that the investment was one that could not be sanctioned by the Court.

Solicitor: Mr. *A. S. Lawson.*

In re RIDEOUT'S TRUSTS.

V.-C. J.
1869
July 24.
1870
Jan. 22;
Feb. 26.

Evidence—Proceeding instituted in consequence of Adultery—Non-access—Evidence of Husband—Corroboration—32 & 33 Vict. c. 68, s. 3.

A petition by a widower claiming to be interested for life, and five children of the marriage claiming to be interested absolutely, in the reversion of a fund, and praying for payment of moneys out of Court, was opposed by a Respondent who claimed to be entitled, as one of the children of the marriage, to one-sixth of the reversion. The husband gave evidence that the opposing Respondent was born during the coverture, but alleged his illegitimacy on the ground of non-access:

The Court, notwithstanding the enactment of the *Evidence Further Amendment Act*, 1869 (32 & 33 Vict. c. 68), s. 3, which enables husbands and wives of parties to give evidence in any proceeding instituted in consequence of adultery, required corroboration of the husband's evidence as to non-access.

BY an antenuptial settlement, dated the 22nd of June, 1831, the intended husband covenanted with trustees that, in case the intended marriage should take place, he would assign the reversionary interest of the intended wife (expectant on the death of a tenant for life) in certain funds to the trustees, upon trusts during the joint lives of the husband and wife for the separate use of the wife for life, then for the survivor for life, then for the children of the marriage who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, in equal shares.

In 1848, the funds were paid into Court.

(1) 2 Coll. 324. (2) 4 K. & J. 704.
(3) 23 Beav. 543.

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There were five children of the marriage who attained twenty-one, or who, being daughters, attained that age or married.

On the 5th of December, 1843, a separation took place between the husband and wife, who was then residing in *Paris*. On the 15th of October, 1845, the wife, still residing in *Paris*, gave birth to a male child.

On the 1st of May, 1849, the husband obtained a decree of divorce *à mensâ et thoro*, on the ground of adultery; and by an Act of Parliament passed in July, 1854, the marriage was dissolved on the ground of such adultery.

By a contract of marriage in the Scotch form, dated the 7th of September, 1857, the divorced husband renounced in favour of trustees on behalf of his son, then about to be married, one-fifth of his life interest in the income of the trust funds subject to the settlement, upon the trusts therein declared.

In February, 1858, the divorced wife died.

On the 3rd of October, 1868, the tenant for life died. Thereupon the funds which were the subject of the settlement were transferred to the account of such trusts.

The divorced husband and the five children above-mentioned, or persons claiming under them, presented this Petition, making Respondents the various trustees, and the son born in *Paris* on the 15th of October, 1845. It stated that after the 5th of December, 1843, the husband and wife never cohabited; and that the rights of the Petitioners were admitted by all the Respondents except the son born on the 15th of October,1845, who claimed to be entitled, in reversion expectant on the death of the divorced husband, to one-sixth of the fund; and prayed in substance for the payment out of Court of one-fifth of the last-mentioned funds to the trustees of the settlement of the 7th of September, 1857, and for payment of the income of the residue to the divorced husband for his life.

The Petition was supported by an affidavit of the husband, stating, amongst other things, the fact of the separation, and that he and his wife "never afterwards cohabited"; that the wife continued to live in *Paris*, where, as he had heard and believed, on the 15th of October, she was delivered of a male child, whose birth was registered in *Paris*, as he described.

The Petition coming on upon this evidence only as to the non-access, His Honour, on the 24th of July, 1869, said that the order might be made, subject to the production of evidence by some person other than the husband as to the illegitimacy of the son born in *Paris*.

On the 22nd of January, 1870, the Petition was mentioned again on a further affidavit by the husband, filed on the 18th of December, 1869, in which he stated that immediately after the separation he left *Paris* and came to reside in *England*, and that he never was in *France* after November, 1844, to the end of 1845, except on the occasion next referred to; that he went to *Paris* accompanied by his solicitor, since deceased, and arrived there on the afternoon of the 24th of February, 1845; that on the 26th of the same month he and his solicitor procured the assistance of two commissioners of police, and went to the house of the wife, for the purpose of procuring evidence of her adultery. On the 1st of March, 1845, he and his solicitor left *Paris* for *London*. During the time deponent was in *Paris* he did not see his wife. He positively swore that the child born on the 15th of October, 1845, in *Paris*, could not have been and was not his child. He never saw his wife after October, 1844, to the day of her death.

Mr. *A. Smith*, for the Petitioners:—

We have not succeeded in getting any evidence except that of the husband; and it is submitted that since the statute of 1869 such evidence is admissible.

The old rule was that the evidence of neither husband nor wife is admissible to prove non-access, where the object of introducing the evidence is to bastardize a child or children. But in 1843 was passed the 6 & 7 Vict. c. 85, enabling criminals and interested persons to give evidence; in 1851 came the 14 & 15 Vict. c. 99, enabling parties to be admitted as evidence, except in "any action, suit, proceeding, or bill in any Court of Common Law, or in any Ecclesiastical Court, or in either House of Parliament, instituted in consequence of adultery;" and in 1853 was passed the 16 & 17 Vict. c. 83, which enabled the husbands and wives of parties to be witnesses, but with the exception that a husband was

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not rendered competent to give evidence against his wife in any proceeding instituted in consequence of adultery.

The policy of the Legislature was to exclude the evidence of suspicious classes of witnesses—a policy which has been gradually relaxed, until at length in 1869 was passed the 32 & 33 Vict. c. 68, which enacts (s. 3), as follows: "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding," with a proviso that no witness is bound to answer a question tending to criminate him or herself.

This Petition has been rendered necessary by the birth of the child, and is therefore a proceeding instituted in consequence of adultery; and the effect of the statute is to do away with the old rule. *A fortiori* is this the result where it is not the direct object of the petition to bastardize the child, though that no doubt will be its effect, if the prayer be granted.

Mr. *Ayrton*, Mr. *Haddan*, and Mr. *Miller*, for the Respondents, were not called upon.

SIR W. M. JAMES, V.C.:—

I do not like to say that the effect of the statute is to supersede the old rule. If it be so, it will now be in the power of any husband or wife, alone, to bastardize issue. I am afraid you must give me some other evidence.

With regard to the visit to *Paris* in 1845, I suppose you can get the solicitor's bill of costs; and if that be put in evidence, it will afford so strong a presumption that I think I can assume the fact of non-access on that occasion.

1870

Feb. 26. The matter was mentioned again to-day.

Mr. *Smith* read an affidavit of the husband putting in evidence an extract from the solicitor's bill of costs for journey to *Paris*, with full statement of particulars of business proceedings there from the 22nd of February to the 3rd of March, 1845; also an affidavit of the husband's brother, a resident in *Paris*, who deposed

to the visit of the husband to *Paris*, in February, 1845, for the purpose of procuring evidence, and that for two months previously to the 24th of February, 1845, the husband had resided continuously in *England*, as the deponent knew by reason of frequent correspondence with him.

Upon this evidence—

The VICE-CHANCELLOR made the order as prayed.

Solicitor for the Petitioners: Mr. *Samuel Spofforth.*

Solicitors for the Respondents: Messrs. *Senior, Attree, & Johnson,* agents for Messrs. *Hill & FitzHugh, Brighton;* Mr. *T. H. Dixon*; Messrs. *King & McMillin.*

In re BRACKENBURY'S TRUSTS.

Legacy—Tenant for Life and Remainderman—Sole Trustee—Appointment of additional Trustee—Costs of Petition.

Where a legacy had been bequeathed to a sole trustee upon trust for a tenant for life, and then for reversioners absolutely, the costs of a Petition by the reversioners for the appointment of an additional trustee were ordered to be paid by the Petitioners, and not out of the *corpus* of the legacy.

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ELIZABETH FISHER BRACKENBURY, widow, by her will, dated the 9th of September, 1869, bequeathed to her friend *Charles Michell Nesbitt* £1000, "at present deposited with the *Lincoln and Lindsey Banking Company,* at *Louth,*" upon trust "to place out the same on good real or sufficient personal security," and to pay the income to *William Brackenbury* for life; and after his decease upon trust to stand possessed of the same for her nephews *Henry Downes* and — *Young* equally. She bequeathed her residue to *Downes* and *Young,* and appointed them executors, and died on the 19th of September, 1869.

Messrs. *Downes* and *Young* presented this Petition, stating that the testatrix left a sum of upwards of £1000 in the bank; that they had requested *W. Brackenbury* to concur with them in the appointment of a proper person or persons to be a trustee or trustees of the legacy in addition to *C. M. Nesbitt;* but that he refused

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to concur in such appointment, and had required the Petitioners to transfer to *Nesbitt* as trustee.

The Petitioners prayed that two persons, whom they named in the Petition, should be appointed trustees of the legacy in addition to *C. M. Nesbitt*, and that the costs of all parties might be taxed, and paid out of the legacy.

Mr. *C. T. Simpson*, for the Petitioners:—

It is the right of these Petitioners to have a second trustee appointed, and to have the costs out of the *corpus* of the legacy: *Grant* v. *Grant* (1).

The object in not having the money paid into Court is to preserve the extended power of investment given by the will.

Mr. *North*, for the Respondents, *Nesbitt* and *Brackenbury*:—

This case is distinguishable from *Grant* v. *Grant*. There the fund was very large (£30,000), and the trustee was also a beneficiary, subject to the life estate.

The Court will not, except under very special circumstances, interfere with the legal right of the trustee.

At least, it will not order costs of a Petition of this sort out of the fund.

SIR W. M. JAMES, V.C.:—

I think it is very probable that it may be a reasonable thing to have a second trustee, or two other trustees, though I confess I do not precisely see where the right is.

But if the Petitioners want another trustee or other trustees, they must pay the costs of the Petition.

The order will be that the tenant for life name an additional trustee, to be approved by the Judge in Chambers in case the parties differ; then that such person so approved be appointed a trustee in addition to *Nesbitt*; the Petition to be mentioned in a fortnight, if a proper trustee is not named by the tenant for life in the meantime; the Petitioners to pay the costs of the Petition.

Solicitors: Mr. *James Johnston*; Messrs. *Norris, Allens, & Carter*.

(1) 34 L. J. (Ch.) 641.

CASTELLAN *v.* HOBSON.

V.-C. J.
1870
May 3, 6.

Company—Sale of Shares—Indemnity—Concealed Principal.

A., through his broker, sold shares to a jobber, from whom *B.* had agreed to purchase the same number of shares, giving the name of *C.*, one of his workmen, as the person to whom the shares were to be transferred.

A. executed the transfer to *C.*, and afterwards received the purchase-money; but from the winding-up of the company the transfer was not registered, and the shares still remained in the name of *A*:—

Held, that *B.*, as the real purchaser and equitable owner, was bound to indemnify *A.* against all calls in respect of the shares.

ON the 10th of May, 1866, the Plaintiff instructed *Curwen*, his broker, to sell twenty shares in the *Imperial Mercantile Credit Association, Limited*. *Curwen* sold the shares, which were then at 9 discount, to *Hammon Paine & Co.*, stockjobbers, for delivery on the 15th of May. The Defendant *Hobson*, about the same time, instructed Messrs. *Inchbald*, his brokers, to purchase shares in the same company. Messrs. *Inchbald* purchased the same number of shares from *Hammon Paine & Co.*, the price having in the meantime risen to 7½ discount.

On the settling-day, Messrs. *Inchbald*, by direction of *Hobson*, gave the name of the Defendant, *W. M. Banks*, one of his workmen, as the person to whom the shares were to be transferred. The Plaintiff, on the 17th of May, 1866, executed a transfer of the shares to *Banks* as transferee, and received the purchase-money on the 25th of May, but the transfer had not been executed by *Banks*; and from the company having stopped payment on the 11th of May, and the presentation of a winding-up Petition on the 12th of May, the books of the company were closed, and the shares still remained registered in the name of the Plaintiff. A special resolution for a voluntary winding-up was passed on the 28th of May, and confirmed on the 14th of June, 1866, and on the 25th of June Vice-Chancellor *Wood* made an order for continuing the winding-up under supervision.

The Plaintiff, as the person in whose name the shares were still registered, had been placed on the list of contributories, and compelled to pay calls which were made under the winding-up; and

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the present bill was filed, praying a declaration that the Plaintiff became, as from the 15th of May, 1866, and still was, a trustee of the twenty shares for the Defendant *Hobson*, and that *Hobson* was bound to indemnify the Plaintiff against all calls made or to be made on the shares, and against all liability and loss which the Plaintiff had or might incur in respect of the shares, and by reason of his being settled upon the list of contributories in respect of such shares. The bill also prayed payment by *Hobson* of the sum already paid by the Plaintiff in respect of calls since the 15th of May, 1866, and an indemnity against all existing or future calls.

It appeared that soon after the execution of the transfer by the Plaintiff to *Banks*, *Hobson*, through his broker, *Inchbald*, offered to pay the calls in respect of the shares and take a transfer of them into his own name, if the Plaintiff were willing to transfer the same. The offer was not accepted, as the Plaintiff considered that after executing a transfer to *Banks* he could not substitute *Hobson's* name for that of *Banks*.

Mr. *Kay*, Q.C., and Mr. *A. T. Watson*, for the Plaintiff:—

It is admitted that *Hobson* was the real purchaser of the shares, and the name of *Banks*, who was a mere agent, having been given at the instance of *Hobson*, as the transferee, the Plaintiff is entitled while the matter is still in contract to relief against the concealed principal: *Shaw* v. *Fisher* (1); *Nickalls* v. *Furneaux*, before Vice-Chancellor *James*, May 6, 1869.

Mr. *Marten*, for the Defendant *Hobson*:—

The Plaintiff is not entitled to relief, as there was no privity or contract between himself and *Hobson*. His original contract was with *Hammon Paine & Co.*, the jobbers, who remained liable to him until the settling-day, when the name of *Banks* being given in by them as transferee of the shares, followed by acceptance of the purchase-money and an execution of the transfer to *Banks*, the original contract with the jobbers, which up to that time was in solution, is discharged, and a new one created with *Banks*, to which *Hobson* was no party, and by which he was in no way

(1) 5 D. M. & G. 596, 609.

affected. The Plaintiff might obtain a decree against *Banks*, and *Banks* might have his remedy over against *Hobson*, for whom he held the shares as a trustee; but there was no privity between the Plaintiff and *Hobson*, so as to give the Plaintiff a right of suit against *Hobson* directly: *Ex parte Bugg* (1); *Bermingham* v. *Sheridan* (2); *Coles* v. *Bristowe* (3); *Hawkins* v. *Maltby* (4); *Lindley* on Partnership (5).

Secondly: Assuming there to have been any contract between the Plaintiff and *Hobson*, it failed by the winding-up of the company before it was completed, and no indemnity can be obtained by the Plaintiff.

Thirdly: The Plaintiff has been guilty of laches, and, moreover, has refused the offer made by *Hobson* to take a transfer into his own name and pay the calls.

Mr. *Kay*, in reply:—

As to the objection that there was no contract between the parties: *Hawkins* v. *Maltby* (6). There was a complete contract between the Plaintiff and *Banks*, according to the rules and custom of the *Stock Exchange*, which are imported into their transactions; and it being made out that *Banks* was a mere nominee of *Hobson*, the real purchaser, *Hobson* is liable to the Plaintiff: *Coles* v. *Bristowe*; *Sheppard* v. *Murphy* (7). Nor does the winding-up put an end to the contract absolutely, or render it incapable of performance, if the Court shall so direct: *Companies Act*, 1862, s. 153. But our bill is not for specific performance, but for an indemnity against the legal liability in respect of the shares which attaches to the Plaintiff from his name being still upon the register. As to the refusal by the Plaintiff of the offer to substitute *Hobson's* name for that of *Banks* in the deed of transfer, the Plaintiff had no power to make the alteration; and if the offer had been *bonâ fide*, *Hobson* should have called upon *Banks* to transfer the shares to him. *Hobson* being admittedly the real purchaser, cannot escape from his liability by getting the shares

(1) 2 Dr. & Sm. 452.
(2) 33 Beav. 660.
(3) Law Rep. 4 Ch. 3.
(4) Law Rep. 3 Ch. 188; Ibid. 4 Ch. 200.
(5) Page 716.
(6) Law Rep. 4 Ch. 202, 203.
(7) 16 W. R. 948.

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CASTELLAN v. HOBSON.

transferred into the name of a mere man of straw as trustee for himself.

SIR W. M. JAMES, V.C.:—

In this case the Plaintiff, having certain shares in the *Imperial Mercantile Credit Association, Limited*, through his broker on the *Stock Exchange* entered into a contract for the sale of them to a stockjobber. The Defendant *Hobson*, through his broker, made an agreement for the purchase of shares in the same company from the same jobber. The transaction was completed, according to the rules and practice of the *Stock Exchange*, by the broker of *Hobson* giving in the name of *Banks* as the person to whom the transfer of the Plaintiff's shares was to be made. A transfer was accordingly executed, or purported to be executed, by the Plaintiff, so as to transfer the shares to *Banks;* but either through the state of the company at that time, or through the neglect of the transferee to take the proper steps, the transfer was never, in fact, completed in the only mode in which it could be completed, by the registration of the shares in the name of *Banks;* and *Castellan*, in the result, therefore, has remained legal owner of the shares, and legally liable to the calls which have been made in respect of them. Having thus been called upon to pay money, he has filed his bill against *Hobson* and *Banks*, insisting upon being indemnified by *Hobson*, the real purchaser, in respect of those calls. The defence set up is this, *Hobson* says: "I never had any contract with you at all, there never was any privity between you and me. I entered into a bargain with the jobber. There were distinct bargains at two distinct places, and when the thing was completed, so far as the broker was concerned, by your accepting, through your agent, the name of *Banks* as the transferee, then the relation of vendor and purchaser, by that kind of novation, was established between you and *Banks;* but you never came, in any way, directly or indirectly, into contact with me in the matter. You may have such remedy as you like against *Banks*, who is bound to indemnify you as being transferee of the shares." Mr. *Banks*, on the other hand, being a man in a state of impecuniosity, being vacuous, is able to take this liability upon himself; he is able to laugh at liquidators and the decrees of the Court, and will

go his way singing cheerfully and merrily. That is ingenious, certainly; but even if it stood there, I think the Court would have found its way to say, if *Castellan* has a right to indemnity over from *Banks*, *Banks* has a right to indemnity over against *Hobson*, and it will pass over the intermediate man and make *Hobson* do that which he is bound to do. But the real answer is, that it is not a question of vendor and purchaser, it is not a question of specific performance at all; it is a question of trustee and *cestui que trust*. The result of the transactions is, that *Castellan* remains the legal owner of the shares without any beneficial interest in them. As legal owner he has remained exposed to liabilities, and he is entitled to indemnity from the real equitable owner of the shares, for whom he was trustee. For whom, then, is he trustee? He is trustee for *Hobson*, and not for *Banks*. *Banks* by the transaction has never acquired any legal or equitable right or interest whatever in these shares. He is a mere name. In truth, cases have frequently occurred in this Court in which what is called the intermediate trustee of a mere equity has been disregarded altogether. The cases are collected in *Lewin* on Trusts (1). Mr. *Lewin* there says: "The intermediate trustee of a mere equity need not, except under special circumstances, be made a party;" and then there are several cases given in the note to support that. That is to say, a man who has no property, who has no right to receive anything in respect of the shares, who has no power of disposition over them, is a mere name. He may be an agent, he may be an attorney, but he is not the owner, either as a trustee, or in any other sense whatever, of the shares. *Castellan*, therefore, being the legal owner, and *Hobson* being the beneficial owner, and *Banks* being a mere name interposed between the two, *Hobson*, the real beneficial owner, the *cestui que trust* for whom *Castellan* is trustee, is bound to indemnify him against the calls which have been made.

Another defence suggested was, that *Castellan* had been guilty of great laches or delay; that being told that *Hobson* was the real owner, and asked by him to alter the transfer, and substitute his name for that of *Banks* in the transfer, after a time he declined to do so. That was a thing which *Hobson* had no right to ask. It

(1) Page 709.

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would have been a very improper act to alter the deed, and nothing that *Castellan* could do could in any way alter the title of *Hobson*. *Banks*, being *Hobson's* servant, was perfectly ready, as appears by the answer, to do anything that *Hobson* wanted in the matter. *Banks* would have signed any declaration that his name was only used on behalf of *Hobson*, and would thereby have rendered it unnecessary for *Castellan* to do anything. It is an ingenious defence, but it only affords another proof that these very skilful devices are really too cunning by half. They turn out to be snares for the inventor, in which he himself is caught; and Mr. *Hobson*, in addition to indemnifying the Plaintiff for the call which he has paid, and for any future calls he may have to pay, will now have the satisfaction of paying the Plaintiff's costs in addition to his own.

Minute of decree, following that in *Evans* v. *Wood* (1):—

Declare that Plaintiff is trustee for *Hobson*, and that *Hobson* is bound to indemnify the Plaintiff against all calls made, and to be made, on the shares, with interest thereon, and all liability and loss; and order him to pay the sum already paid, and to indemnify Plaintiff against future calls, and to pay the costs of the suit.

Solicitors: Messrs. *Wilde, Humphry, Berger, & Wilde;* Messrs. *H. J. & T. Child.*

V.-C. J. 1870 *May 5.*

ALLEN *v.* TAYLOR.

Practice—Affidavit—Omission in formal Part.

The omission in the formal part of an affidavit of the words "make oath and," will render it inadmissible.

THIS was an application to the Court under the following circumstances:—

Some of the affidavits which had been sworn on behalf of the Defendants for the purpose of being used upon an interlocutory motion commenced with the words, "I, *A.B.*, of &c., say," instead of in the usual form, "I, *A.B.*, of &c., make oath and say," and on this

(1) Law Rep. 5 Eq. 9.

ground the Record and Writ Clerks had refused to file them: *Daniell's* Chancery Practice (1).

Mr. *Freeling*, for the Defendants, asked that the affidavits might be filed without being resworn.

Mr. *Marten* (*amicus curiæ*) mentioned that the Lords Justices had decided, in an unreported case, that the omission of the words "I make oath" rendered an affidavit inadmissible, although the form in an answer was simply, "I say."

Mr. *Bristowe*, Q.C., and Mr. *L. Field*, for the plaintiffs.

The VICE-CHANCELLOR said that the affidavits must be resworn unless the other side would consent to waive the objection.

Solicitors: Messrs. *Torr, Janeway, & Tagart;* Messrs. *Field & Co.*

HEWITSON *v.* SHERWIN.

Debtors Act, 1869 (32 & 33 *Vict. c.* 62)—*Order for Payment of Costs—Committal.*

An order of the Court for payment of costs constitutes a debt within the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), capable of being enforced by committal to prison for a term not exceeding six weeks, under sect. 5, in default of payment of the debt or instalments.

THIS was a motion on behalf of the Defendant *William Sparke*, that the Defendants *Joseph Henry Sherwin* and *John Henry Peacock* might stand committed for a contempt of Court for nonpayment of the costs ordered to be paid by them to the said *William Sparke* by an order of this Court, made herein on the hearing of the exceptions for scandal, and dated the 15th day of March, 1870, which costs were duly taxed and certified at the sum of £31 5*s.* 4*d.*; or that, for default of payment of the said taxed costs, the said *Joseph Henry Sherwin* and *John Henry Peacock* be committed to prison for the term of six weeks under sect. 5 of the *Debtors Act*, 1869.

(1) 4th Ed. p. 827.

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In an affidavit filed by the Defendant *Sherwin*, in answer to the Plaintiff's affidavits upon motion for decree, occurred a passage relating to the Defendant *William Sparke*, which was excepted to by *Sparke* as scandalous and irrelevant, it being also asked by the exception that the portion complained of should be expunged, and the costs of and incidental to the exception paid.

The Defendants did not appear to argue the exception, and an order was made for expunging the portion of the affidavit complained of, and directing a taxation of the costs of *Sparke* as between solicitor and client, and payment by the Defendants *Sherwin* and *Peacock*, on whose joint behalf the affidavit had been filed.

The costs were taxed at £31 5*s.* 4*d.*, and a writ of *fi. fa.* was subsequently issued against the goods of the Defendant *Peacock*, but there had been no levy; the sheriff had made a return of *nulla bona*. No execution had been issued against *Sherwin*.

The Defendants were subsequently both served with a subpœna for costs, which was followed by the present notice of motion.

An affidavit had been made in support of the motion, stating that the Defendants *Sherwin* and *Peacock* were in receipt of good salaries as clerks, and possessed sufficient means for paying the amount.

Mr. *G. Lovell*, in support of the motion, contended that there had been not merely a nonpayment but a contempt of Court, for which the Court could commit the Defendants, and referred to *Wenham* v. *Bowman* (1).

The VICE-CHANCELLOR declined to commit the Defendants for contempt of Court to enforce a money demand, holding that he had no jurisdiction in the face of 32 & 33 Vict. c. 62.

Mr. *Lovell* contended that, at all events, he was entitled to an order for committal for six weeks in default of payment.

Mr. *Fry*, Q.C., and Mr. *Horsey*, for the Defendants *Sherwin* and *Peacock*:—

The scope of the Act being the abolition of imprisonment for

(1) 11 Beav. 138.

debt, any exception must be construed strictly. The word "debt," in sect. 5, is distinguished from and does not include an order for payment of costs. In *Reg.* v. *Pratt* (1), *Lush*, J., referring to the different language of sect. 4, says: "The words in the enacting part, 'default in payment of a sum of money,' are advisedly used instead of 'debt,' in order to include cases which might not properly have been called cases of debt, such as costs on a judgment of nonsuit, or costs on a verdict for the Defendant, or damages in an action of tort, or costs under a rule of Court."

[They also referred to the rules and forms under the *Debtors Act*, 1869, of the 1st of January, 1870.]

SIR W. M. JAMES:—

This is a new and very important point, but I am of opinion that the application is within the Act of Parliament. It seems to me that where a Court of competent jurisdiction has ordered a man to pay a sum of money, whether in the shape of costs or anything else, that is a debt due from him in pursuance of an order or judgment of this Court, which is a competent Court to make the order. It seems to me to be a play upon words to say that a debt arising *ex contractu* and a debt arising in respect of costs differ in any way from one another. There is an order of the Court directing a sum of money to be paid, and that is a debt under the order.

I was at first struck by Mr. *Fry's* suggestion, that "default in payment" was put in contradistinction to "debt" in the Act; but that suggestion seems excluded by the language I find in the very same section, in another subdivision of it. The words there are, "may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may from time to time vary or rescind such order." In that case it is clear the debt is spoken of as a debt which becomes due from a person by reason of an order or judgment of the Court. It seems to me to be clearly within the Act, and I see no good reason why it should not be. I do not see why, if a man has an order against him to pay costs, he should

(1) Law Rep. 5 Q. B. 176, 182.

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not pay them if he has the means. It has been sworn that these gentlemen are in receipt of good salaries; they have had the opportunity of filing an affidavit in answer, and they have not done so. Whether they have the means or not must be known to them. The order that I propose to make is, that they pay £5 for the costs of this application at once, and pay the other costs by instalments of £1 each, every month, and in default of such payment then the Plaintiff can apply for a committal.

Solicitors: Messrs. *Heather, Son, & Gill;* Messrs. *Drew & Wilkinson.*

Ex parte WILLIAMS. *In re* PULLEN.

C. J. B.
1870
Feb. 2, 5.

Bankruptcy Act, 1861, *ss.* 192, 198—*Deed of Arrangement—Unreasonable Amount of Composition — Application to vacate Registration and Leave to issue Execution—Laches.*

A creditors' deed, under the 192nd section of the *Bankruptcy Act*, 1861, may be impeached for inadequacy of composition importing fraud.

Such a deed, when registered, is in the nature of a record, and the Court has power to order the registration to be vacated.

Mere delay in applying to set aside a creditors' deed for fraud, is in itself no ground for refusing such an application, if the position of the parties be not altered.

Ex parte Savin (1) distinguished.

THIS was an application by *Williams*, a dissentient judgment creditor, asking that the registration of a deed of arrangement might be cancelled, and that he might be allowed to issue execution. The judgment was obtained on the 5th of May, 1869. The deed was dated the 8th, and registered the 12th of May, 1869, and was made between *Pullen* of the one part, and his creditors assenting to or bound by the deed of the other part; and after reciting the inability of the debtor to pay his creditors in full, it contained a covenant by the debtor to pay a composition of 1*s.* in the pound on the 1st of July following, a release by the creditors, and a proviso making the deed void on failure by *Pullen* to pay the composition according to his arrangement. By the documents filed with the deed, it appeared that the number of creditors was five, all of whom assented to the deed with the exception of the applicant, who was entered as a judgment creditor for £56 7*s.* 8*d.* The amount of debts was stated to be £537, and the amount of the assets £200; an amount therefore, as estimated by the debtor himself, sufficient to pay at least 7*s.* in the pound. From these figures it appeared that the consent of the requisite majority of creditors in number and value had been obtained; but the applicant claimed to be entitled to a further sum of £100 for one year's rent. In the view taken by the Court it became immaterial to consider this question.

(1) Law Rep. 1 Ch. 616

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1870
Ex parte WILLIAMS. *In re* PULLEN.

Mr. *Finlay Knight*, for the judgment creditor:—

The amount of composition is, on the debtor's own shewing, grossly inadequate. The deed, not having been entered into *bonâ fide* for the benefit of all the creditors, can be set aside by the Court: *Ex parte Cowen* (1); *Hart* v. *Smith* (2); *Ex parte Greaves* (3).

Mr. *Reed*, in support of the deed:—

The Court will not consider inadequacy of composition as a ground for cancelling a deed of arrangement. At all events the judgment creditor, having lain by for eight months, is now precluded by delay from making this application: *Ex parte Savin* (4); *Ex parte Sampson* (5); *Ex parte Banfield* (6); *Ex parte Davis and Denton* (7); *Ex parte Sullivan* (8); *Ex parte Ames* (9).

Feb. 5. Mr. BACON, C.J., after stating the facts, and referring to those which were disputed, and observing that they were irrelevant, continued:—

The creditor who disputes contends that he is not bound by the deed, for that it is unreasonable in its provisions, and cannot have been entered into with that good faith which is essential to the validity of such a composition as this deed seeks to enforce upon all the creditors who dissent from its stipulations.

In answer to this it has been argued that the deed is strictly in conformity with the provisions of the statute, and that the creditors who have assented are in number and value sufficient to bind the party moving, who is the only creditor who dissents. The point, however, which was mainly relied on in answer to the motion, was the length of time which had elapsed between the registration of the deed of composition and the application to set it aside; and it is an objection entitled to great consideration. The doctrine of laches is well known, and in suitable cases is acted upon in Courts

(1) Law Rep. 2 Ch. 563.
(2) Ibid. 4 Q. B. 61.
(3) Ibid. 5 Ch. 326.
(4) Ibid. 1 Ch. 616.
(5) Law Rep. 1 Ch. 476.
(6) Ibid. 154.
(7) Ibid. 2 Ch. 363.
(8) 15 L. T. (N.S.) 434.
(9) 19 L. T. (N.S.) 270.

of Law wherever the Court is not by its peculiar rules precluded from adopting it; and much more frequently in Courts of Equity, where no restriction of their power exists. The foundation of it is, that during the interval of delay much may have been done; rights may have been transferred or acquired without notice or reasonable suspicion that the validity of the transactions could or would be questioned, and innocent persons may be prejudiced by the opening of disputes which might have been brought forward at an earlier period. But where no such ground of reasonable apprehension exists, I am not aware that mere delay is of itself an answer to a just claim. Several cases were referred to in the course of the argument, in which the Court, without pronouncing upon the legal rights involved in the discussion, has decided against the applicant on the ground of his laches. In *Ex parte Banfield* (1) the period of delay was eleven months, but during that period the validity of the deed had been recognised to a certain extent by a Judge at Chambers, and his decision had not been questioned; and upon this decision the estate of the debtor had been partly distributed. In these circumstances, and expressly because to decide in favour of the application would be to disturb what had been done towards the distribution of the estate, it was refused. In *Ex parte Savin* (2), the length of time between the registration of the deed and the application was much less, being from the 16th of March to the 31st of May in the same year. The instrument there executed was a deed of inspectorship; one of its objects was the carrying on of considerable trade, for which purpose the trustees were empowered to advance money for the completion of contracts, and to raise money by mortgage of the debtor's estates. During the interval I have mentioned, the deed had been acted upon, liabilities had been incurred, rights had been acquired, and the Court might well, as it did, look with the utmost disfavour upon a creditor who, upon no better ground than that the addresses of some of the creditors were not sufficiently described in the register, asked to set aside the deed; the consequence of which would not only have been injurious to the assenting creditors, but would have exposed the trustees to liabilities they had not incurred for their own benefit. This application was therefore refused

(1) Law Rep. 1 Ch. 154. (2) Law Rep. 1 Ch. 616.

C. J. B. 1870 *Ex parte* Williams. *In re* Pullen.

upon the grounds I have mentioned. In *Ex parte Sampson* (1), which was also referred to by Mr. *Reed*, it is true that one of the Lords Justices thought that if the applicant had proceeded with more diligence the application might have been successful; the judgment of the Court, however, did not turn upon that, but the bankruptcy was sustained on the ground that the alleged inaccuracy in the bankrupt's statement was wholly without the suspicion of fraud, and the estate had been actually sold. In *Ex parte Davis and Denton* (2) the period of delay had been three or four months, the petitioner was the assignee in a bankruptcy founded on the bankrupt's petition, and the object of the application was to annul the existing bankruptcy in order that the assignee might file a new petition, under which he might impeach certain mortgages. He had known of those mortgages from the time of his appointment; he might at any time, by examination or otherwise, have satisfied hinself of the facts; he took no steps, and the bankrupts had become entitled to apply for their discharge; and the application was refused upon the ground that rights had been acquired which it would be unjust to set aside at the instance of so dilatory an assignee. *Ex parte Sullivan* (3) and *Ex parte Ames* (4) were also referred to; both of which proceeded upon the same principle, of not abrogating or disturbing rights and interests which had been acquired during a delay for which no satisfactory excuse was offered. That principle has, in my opinion, no application to the present case. Nothing has here been done or omitted by the creditor now moving, by which the debtor or any other person has been or can be prejudiced; and I am therefore of opinion that the delay which has taken place forms no sufficient answer to the present motion. Reverting, then, to the facts of the case as I have stated them, the matter becomes extremely clear and simple. The law applicable to deeds of arrangement, such as that before me, is well settled by several decisions which were referred to in the course of the argument, and which decisions, although they were given respecting instruments which derive their whole force and effect from statutory provisions of the law in bankruptcy, are founded upon universal principles of law as well as of equity, which have been

(1) Law Rep. 1 Ch. 476.
(2) Ibid. 2 Ch. 363.
(3) 15 L. T. (N.S.) 434.
(4) 19 L. T. (N.S.) 270.

recognised and applied for centuries, before any of those decisions, or the statutes upon which they were made, were in existence, and which principles are and must continue to be of universal application. The law in bankruptcy which enables a majority of creditors to accept and confirm an arrangement with their debtor, to which other creditors do not assent, and so to bind such dissentients, assumes, as an essential condition to the validity of such an arrangement, that it shall be in all respects just; and any taint of fraud, whether it consists in concealment, misrepresentation, inequality, or injustice, wholly vitiates the arrangement, and frees the persons who would otherwise be bound by it. Thus, in a case in which a majority of creditors are so favourably disposed to their debtor that they are willing to accept such terms as he proposes without inquiring whether the offer is the best that can be made, or, at all events, that it is fair and reasonable, they are incompetent to bind other creditors who take a more strict view of their own rights, and are not influenced by any feeling of partiality or favour to the debtor. Benevolence, generosity, forbearance, may be well exercised—with this restriction, however, that the practice of these moral virtues is not made at the expense of other people. To hold the contrary would be directly opposed to the commonest principles of justice and honesty. In the case before me a debtor who, by his own deliberate avowal, possesses the means of paying more than 7*s.* in the pound upon all the debts he owes, offers to pay only 1*s.* in the pound upon those debts, and thereupon asks to be released. Out of five debtors, four say they are willing to accept these terms, and no doubt they are at liberty to exercise their free will in this respect, and even to release the whole of their debts without any payment. But upon what principle can they be allowed to say, as in effect they do, if this deed is to be upheld, that they will be instrumental in forcibly precluding another from receiving from his debtor as much as that debtor is able to pay him? In all suchlike cases this dilemma is presented: Either the assenting creditors know, or they do not know, that the debtor is able to pay a composition of larger amount than that which he has proposed. If they do not know the debtor's means, it can only be by reason of the debtor's suppression of facts material and essential to the exercise by them of their free will,

C. J. B. 1870 *Ex parte* WILLIAMS. *In re* PULLEN.

and in such a case they would be entitled to repudiate a consent which was obtained from them by such suppression. If, on the other hand, they do know the extent of the debtor's ability to satisfy the debts due to them and other creditors, and yet agree themselves to release—and join in compelling unwilling creditors to release—the debtor upon payment of a composition grossly disproportionate to the debtor's means, they wilfully and intentionally make themselves parties to a fraud by which the dissentient creditors are prejudiced. It is needless to say, that a deed based upon grounds so fraudulent and unjust cannot have any validity at law or in equity; and even if the cases of *Ex parte Cowen* (1), before the Lords Justices, and *Hart* v. *Smith* (2), were not, as they are, direct authorities for this proposition, the same conclusion, and no other, could be arrived at. For these reasons I feel myself called upon to accede to the motion before me. The recent decision of the Court of Appeal in *Ex parte Greaves* (3) has conclusively decided that of which I never entertained any doubt—namely, that a deed registered under the *Bankruptcy Act* is in the nature of a record of the Court, and that there is, therefore, jurisdiction to order the registration to be vacated. There must be a declaration that the deed is fraudulent and void; and an order that the registration be cancelled, and that the creditor who moves is at liberty to proceed upon his judgment in the terms of the motion. Having regard, however, to all the circumstances of the case, I do not think fit to make any order as to costs.

Solicitors for the Petitioner: Messrs. *Hollingsworth, Tyerman, & Green.*

Solicitor for the Respondent: Mr. *Pullen.*

(1) Law Rep. 2 Ch. 563. (2) Law Rep. 4 Q. B. 61.
(3) Law Rep. 5 Ch. 326.

Ex parte HOOMAN.
In re VINING.

C. J. B.
1870
Feb. 7, 9.

Bills of Sale Act (17 & 18 *Vict. c.* 36)—*Assignee in Bankruptcy and Assignee under a Bill of Sale—Insufficiency of Description—Possession or apparent Possession.*

The object of the *Bills of Sale Act* (17 & 18 Vict. c. 36) is to give, by means of registration, information to all persons whom it may concern that a debtor, or a person about to contract debts, has executed a bill of sale and thereby deprived himself of a portion of his property. Therefore, where at the date of the execution and registration of the bill of sale, the assignor was lessee and manager of a theatre, and was described in such bill of sale simply as "Esquire":—

Held, that the description was insufficient, and the bill of sale, notwithstanding registration, null and void against his assignee in bankruptcy.

A *bonâ fide* assignee for value under a bill of sale of household furniture and effects, immediately sent a person into the house to take and keep, and who took and kept, possession; but the assignor down to the date of his bankruptcy continued to live in the house and use the furniture as before:—

Held, that the furniture and effects were in the possession or apparent possession of the bankrupt within the meaning of the *Bills of Sale Act*.

THIS was an application by the assignee in bankruptcy of *George James Vining* for a declaration that certain household furniture and effects in the bankrupt's house belonged to the estate of the bankrupt, as against a claim set up by *James Vining*, a *bonâ fide* mortgagee under a bill of sale. The bill of sale was dated the 7th and registered on the 20th of October, 1869; and, on the 23rd of the same month, the purchaser sent a person into the house to take and keep possession of the chattels comprised in the bill of sale; and such person took possession and remained in the house and kept possession of the chattels down to the time of the bankruptcy. *G. J. Vining*, until he was adjudicated bankrupt on the 8th of November, 1869, remained in the house, and had the use and enjoyment of the furniture and effects in the same manner as he had before the execution of the bill of sale. At the date of the execution and registration of the bill of sale, the bankrupt was the lessee and manager of the *Princess's Theatre* in *Oxford Street, London*, and was described in the bill of sale as "*George James Vining*, of 5, *Upper Montague Street, Russell Square*, Esquire."

C. J. B. 1870 *Ex parte* HOOMAN. *In re* VINING.

Mr. *Finlay Knight*, for the assignee in bankruptcy:—

The bill of sale is void against an assignee in bankruptcy, there being no proper description of the occupation of the assignor, he having at that time a distinct occupation as lessee and manager of a theatre: *Allen* v. *Thompson* (1); *Adams* v. *Graham* (2). The furniture was in the apparent possession of the bankrupt at the time of the bankruptcy, within the meaning of the *Bills of Sale Act*, and the possession which was taken was the formal possession referred to in the interpretation clause of that Act: *Gough* v. *Everard* (3).

Mr. *Bridge*, for the mortgagee under the bill of sale:—

Gough v. *Everard* is an authority in our favour; and in *Vicarino* v. *Hollingsworth* (4), under a state of circumstances much weaker than these, it was held that the furniture was not in the possession, order, or disposition of the trader at the date of his bankruptcy. The words in the interpretation clause, "notwithstanding that formal possession thereof may have been taken by or given to any other person," must be taken to mean that where any other possession besides a merely formal one has been taken, there the words "possession" or "apparent possession," in the earlier part of the Act, cannot apply.

Feb. 9. Mr. BACON, C.J.:—

The question in this case is, whether the assignees in bankruptcy of *George James Vining* are entitled to certain furniture and effects which, at the date of the adjudication, were in a dwelling-house occupied by the bankrupt, or whether the same effects belong to *James Vining*, to whom they had been assigned by the bankrupt by a bill of sale dated the 7th and registered on the 20th of October in the last year; and the parties have agreed to submit the whole case and all questions between them to the decision of this Court. The claim of the assignee has been argued upon two grounds: first, that the description of the assignor (the bankrupt) in the deed does not comply with the requisitions of

(1) 25 L. J. (Ex.) 249. 2 Jur. N.S. 451 (3) 32 L. J. (Ex.) 210.
(2) 33 L. J. (Q.B.) 71. 10 Jur. N.S. 357 (4) 20 L. T. (N.S.) 362.

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the *Bills of Sale Act* (17 & 18 Vict. c. 36), which prescribes that there shall be a description of the residence and occupation of the person making or giving the same. The bankrupt is the lessee and manager of a theatre in *London*. He says that at the time of giving the bill of sale he was not under any acting engagement, although he did occasionally appear on the stage, and it has therefore been argued that his description in the bill of sale as an "Esquire" is sufficient. If this were the only point in the case, I should be of opinion, without any hesitation, that the description he has adopted is insufficient, and that the statute has not been complied with. The bankrupt is by profession an actor, and although it is said that he was not at the particular time referred to under any engagement to act, yet he was undoubtedly a manager of actors. He had the conduct of a theatre, in which he must of necessity have had an abundance of employment in preparing plays for representation, in engaging and directing such performers as were there employed, and in entering into a variety of personal contracts incident to his business and occupation as a manager, as well within the terms of the statute as within that which must be taken to be its meaning and object—namely, the giving, by means of the registration, information to the persons who had dealings with him. I am of opinion that the bill of sale, notwithstanding its registration, is defective for want of an accurate description of the occupation in which the bankrupt was engaged. Upon this point, if authority were needed, it is furnished by the cases of *Allen* v. *Thompson* (1) and *Adams* v. *Graham* (2).

The assignee insists, further, that inasmuch as the furniture and effects in the bankrupt's house were at the date of the bankruptcy in his apparent possession, the bill of sale (the requirements of the statute not having been fulfilled) is invalid as against his statutory title; and they rely upon the interpretation clause of the Act of Parliament, which defines the apparent possession to be that of the person making the bill of sale, so long as the chattels shall remain in any house occupied by him, or shall be used and enjoyed by him in any place whatever, notwithstanding that formal possession may have been taken by or given to any other person.

(1) 25 L. J. (Ex.) 249. (2) 33 L. J. (Q. B.) 71.

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The facts which it now becomes most important to consider—for the question is really one of fact—appear to be these:—The bankrupt, being in want of an advance of money, applied to his father, the Respondent, who agreed to lend, and did lend him, £400 upon the security of the chattels assigned by the bill of sale; and I may add that there is no reason to doubt the perfect good faith of the transaction in this or in any other respect. The money not being repaid, the Respondent determined to enforce his security; and on the 25th of October last, by his agent, *William Backhouse*, he took possession of the whole of the furniture and effects assigned by the bill of sale, and which then were, and which still remain, in the house occupied by the bankrupt. *Backhouse* says that he was furnished with a copy of the bill of sale, and was desired by the Respondent's solicitor to shew it to any person claiming the furniture or interfering with his possession thereof; that he retained possession until the 16th of November last, when he gave up possession to *Vivian*, another agent of the Respondent. *Vivian* says that on the 15th of November last he relieved *Backhouse*, and has ever since continued, and is still, in the like possession. On the day last mentioned the messenger in bankruptcy claimed to take possession of the goods, which *Vivian* refused to give him. He was unable to prevent him from remaining in the house, and the messenger is still there, but *Vivian* has refused to relinquish his possession. The Respondent's counsel insists that the description of the bankrupt in the bill of sale is sufficient, but, even if it should be held not to be so, the point is immaterial, for that the *Bills of Sale Act* only gives a preferable or paramount title to assignees in bankruptcy where the apparent possession of the chattels is in the bankrupt at the time of the bankruptcy. And it is argued that in this case, and upon the facts I have stated, there was no possession in the bankrupt, apparent or otherwise, and that the interpretation clause does not help the claim of the assignees; for that the possession taken and kept by the Respondent was not that formal possession which is there mentioned, but was a real and actual possession taken and kept, and was not in any sense a symbolical possession—a taking of a part to represent the whole—but that from the time when *Backhouse* went into the house the possession was and has been that of

the Respondent in his own right and as of his own property. Several cases have been referred to, and one of them, strange to say, is most strongly relied upon by each of the counsel as supporting his view. That is the case of *Gough* v. *Everard* (1). The question was between a person who claimed as vendee of the property in dispute, under an instrument which, if it could be properly called a bill of sale, at least had not been registered under the statute, and a judgment creditor of the vendor, who had levied his execution against what, as alleged, were the goods of the vendor. The point therefore was, and could only be, assuming the instrument to be a bill of sale and not registered, whether the vendee had such full and perfect possession as to exclude the operation of the statute, upon the ground of some apparent possession remaining in the vendor, and so to negative the fact, or the presumption, that the possession of the vendee had been formal only; or whether the chattels in question had been so sold to and possessed by the vendee as to make it immaterial whether there was a bill of sale within the meaning of the statute, whether registered or not. The property was of three kinds: first, timber lying on a wharf belonging to another person, deposited there till a purchaser could be found for it, and in the meantime unquestionably the property of the vendor before it had been assigned by him; secondly, timber and other moveable chattels, the property of the vendor, lying upon premises of which the vendor was owner and occupier; and thirdly, the furniture and effects in a dwelling-house and counting-house which had also belonged to the vendor. These three several kinds of property the vendor sold to the vendee for prices and upon the terms agreed on between them, and the fairness of the transaction appears to have been open to no suspicion. It was proved that, with respect to the first, the vendee, after his purchase, had taken persons to see the timber with a view to their buying it, and had in that respect acted as the owner; that as to the second, he had the key of the place in which the chattels were delivered to him; that he had sold, or offered to sell, some of the articles to purchasers; and as to the third, that he had used and occupied the house and counting-house, and had paid, as under the terms of his contract he had undertaken to pay, the wages of the servant

(1) 32 L. J. (Ex.) 210.

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who was in charge of the premises. These facts being proved, Mr. Baron *Bramwell*, before whom the case was tried, left it to the jury to say whether the transactions between the vendor and vendee were *bonâ fide*. The jury found a verdict in the affirmative, and in favour of the vendee, and the case came before the full Court upon a motion to enter the verdict for the Defendant, when the question argued was, whether the property was at the time of seizure in the possession, or apparent possession, of the vendor within the meaning of the *Bills of Sale Act*, or whether it was subject to the execution of a judgment creditor. The Judges of the Court of Exchequer held that, on the facts stated, there was no possession, or apparent possession, by the vendor within the *Bills of Sale Act* or otherwise, so as to render the effects liable to seizure by an execution creditor of the vendor.

It seems to me impossible to doubt the correctness of this judgment, even if it were competent to me, and I were disposed, as I am not, to dissent from it. The facts proved before the jury, and commented upon by the Judges, shew most conclusively that the property which had once been that of the vendor had become the property of the vendee, and that the vendor had no right in, nor possession, apparent or otherwise, and that much more than formal possession had been given to and taken by the vendee. Having given to this case the fullest attention, I must say I do not perceive that it has any direct bearing upon that which is now before the Court. The decision turned upon mere facts, and these being ascertained, there was no ground for saying that there was any distinction to be drawn between the actual possession and the apparent possession, both of which were united in the same person. *Vicarino* v. *Hollingsworth*, a case decided in the Queen's Bench (1), was also relied upon by the Respondent; but I think that upon examination it will be found not to lay down any rule which can be applied to the present case. A bill of sale had been executed by a trader to secure an advance of money. The lender, on the day of the execution of the bill of sale, sent a person who took and retained possession of the chattels assigned; and it would appear that they had been actually removed and sold—but whether before or soon after the bankruptcy, which happened within a week of the

(1) 20 L. T. (N.S.) 362.

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execution of the bill of sale, does not distinctly appear, nor is it material—so that no question did or could arise respecting its registration. The assignees in bankruptcy brought an action against the lender, for money had and received to their use. The only ground upon which they claimed was, that within the terms of the statute in bankruptcy the goods were at the time of the bankruptcy, by the consent and permission of the true owner, in the possession, order, or disposition of the bankrupt. This raised a mere question of fact, as "order and disposition" is in all cases only a question of fact. It being proved that the agent who had taken possession was a young woman, who lived in the house with the bankrupt and his family, took her meals with them, sat in the same rooms, and lived as one of the family, it was urged on the part of the Plaintiffs that the possession by her was not real and substantial, but colourable only, and that the goods, notwithstanding her presence in the house, remained in the ostensible possession of the bankrupt, and, with the consent of the true owner, were within his order and disposition. The learned Judge who tried the cause directed the jury, "if they came to the conclusion that the young woman was *bonâ fide* in possession of the furniture, so that she would not have allowed the bankrupt or any one else to deal with it contrary to her instructions," to return a verdict for the Defendant—which they did. On a motion for a new trial on the ground of misdirection, the Court was unanimously of opinion that there had been no misdirection, that the parties had intended an actual possession, and that the young woman had been put into possession for the purpose of preventing any attempt on the part of the bankrupt to dispose of the furniture. It was said by the Lord Chief Justice on that occasion, that the current of recent decisions had been less in favour of the title of assignees than formerly. And this may well be in cases of "order and disposition," but cannot, I think, in any way influence the matter now before the Court. The fact of the possession, the nature of it, the circumstances under which it was taken, the consent of the true owner, are all matters to be inquired into and determined by a jury. The question before me, although depending greatly upon facts, is simply, whether the goods in question were, or were not, at the time of the bankruptcy in the possession, or apparent possession

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(not ownership, as is remarked by Mr. Baron *Bramwell*), of the bankrupt. The scope and object of the *Bills of Sale Act* are obvious. It was passed to prevent the mischief arising from a practice too commonly resorted to by debtors of making an assignment of their property to certain creditors, who, when the insolvency of the debtor becomes apparent, enjoy a preference over other creditors. The mode of preventing this injustice and injury to credit which the statute has established is, first, to require a public registration, in the manner and form prescribed, accessible to all whom it may concern, of transactions by which a debtor or a person about to contract debts deprives himself of portions of his property. If this regulation is complied with, the persons who trust the debtor cannot be heard to say that they had not the means of satisfying themselves, as far as the visible possession of property is concerned, whether or not he was to be trusted. If it be not complied with, as, for the reasons I have mentioned, I am of opinion that in this case it has not, it is declared to be null and void in certain cases as against, among other persons, assignees in bankruptcy. Then arises the question whether the goods in question were or were not in the apparent possession of the debtor. Of course if (as in the case of *Gough* v. *Everard* (1),) the actual possession was in the owner of the bill of sale, and there was not and could not be any apparent or other possession, it would be indifferent whether the bill of sale were registered or not. A bargain and sale, or even a mortgage or pledge, completed by delivery made and possession taken, would, unless a fraudulent preference, preclude any claim by assignees or any other person. The goods were at the time the sole property of the bankrupt; they were, and have remained, and still are, in the house he dwelt in. Agents have been put in possession of them for the purpose of protecting the title of the Respondent under the bill of sale; but nothing has been done to change, in the view of the outer world, that appearance of ownership which the bankrupt was and, for anything that appears, is still invested with. He says in his affidavit that notwithstanding the entry by the agents of the Respondent he has had and still has the use of the goods. Now, having to discharge to some extent the function of a jury, I cannot hesitate

(1) 32 L. J. (Ex.) 210.

a moment in saying, upon the facts in evidence, that, in the words of the interpretation clause of the statute, these goods, being in the bankrupt's house, used and possessed by him, are, and were at the time of the bankruptcy, in his apparent ownership as defined by the statute. But then it is urged in argument that the words at the end of the interpretation clause, "notwithstanding that formal possession only have been given or taken," have the effect of qualifying the generality of the preceding enactment, and that where any other than a merely formal possession has been taken, as is said to be the case here (although I am by no means convinced of that as a fact), the preceding definition of apparent ownership becomes of no effect. And in support of this, reference has been made to an expression in Mr. Baron *Bramwell's* judgment, in which he says, "the interpretation clause applies to cases where formal possession has alone been given" (1). I do not, however, think the context of the learned Baron's judgment bears the construction which it has been attempted to put upon these words, nor can I read the statute in the manner which has been suggested by the Respondent. The plain enactment is, in substance, that if the owner of the bill of sale does not comply with the provisions of the statute, his security shall be void against assignees in bankruptcy with respect to chattels left in the apparent ownership of one who becomes bankrupt. He (the creditor) is at liberty under his bill of sale, whether registered or not, to take possession of that which has been assigned to him, and to remove or deal with it as the owner. If, instead of exercising this right, he thinks fit to leave the goods which have been assigned to him, and which have thereby become his, in the house of his debtor, the bill of sale not having been duly registered, he leaves them in that debtor's apparent ownership, and he cannot be relieved from the consequences by proving only that it was not a merely formal possession which was taken by him. To decide otherwise would, in my opinion, be not only to impair the usefulness of the *Bills of Sale Act* in a very mischievous degree, but it would be to misconstrue its plainly-expressed enactments.

The order, therefore, will be to declare that the assignee is entitled to the chattels comprised in the bill of sale as part of the

(1) 32 L. J. (Ex.) 214.

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bankrupt's estate to be administered in the bankruptcy; and having regard to the manner in which the question has been submitted to this Court for its decision, I make no order as to costs, except that the assignee is to have his costs out of the estate.

Solicitors for the Petitioner: Messrs. *Routh & Stacey.*
Solicitors for the Respondent: Messrs. *Walker & Martineau.*

SHIP *v.* CROSSKILL.

M. R.
1870
March 14, 21.

Company — Variation between Prospectus and Memorandum — Recovery of Deposit and Calls—Liability of Directors—Fraud—Misrepresentation— Scienter—Jurisdiction.

A person who has had his name removed from the register of shareholders of a company for variance between the memorandum and prospectus is not entitled to file a bill for the purpose of compelling the directors personally to refund the deposit and calls he has paid in respect of the shares, unless they have been guilty of fraud; and, *semble*, his relief against the company is at law.

A prospectus issued early in May stated that more than half the capital had been subscribed for. On the 28th of May the Plaintiff applied for shares, which were allotted to him on the 1st of June. At the time when the prospectus was issued half the shares had not been applied for; but before the 28th of May applications for more than half the capital had been received, and before the 1st of June for more than the whole:—

Held, that there was no misrepresentation for which the Plaintiff was entitled to relief.

Stewart v. *Austin* (1) and *Henderson* v. *Lacon* (2) discussed.

IN the early part of May, 1864, a prospectus was issued of a joint-stock company, proposed to be incorporated under the *Companies Act*, 1862, and to be named the *Scottish and Universal Finance Bank*. This prospectus was in part as follows:—

"Capital One Million.

"With power to increase to Five Millions.

"20,000 shares of £50 each. First issue, 10,000 shares.

"£1 on application, £4 on allotment, and £5 in three months.

"It is not intended to call up more than £25 per share. In the event of no allotment of shares being made, the deposit-money will be returned in full.

"If more shares are applied for than are allotted, the surplus of the deposit-money will be applied to the payment due on allotment. . . . .

"More than half of the capital being already subscribed for, the list will remain open only a few days; and by a resolution of the board the whole of the remaining shares will be allotted in strict order of application *pro râta*. . . . ."

The following persons were named as the directors: *William*

(1) Law Rep. 3 Eq. 299. (2) Law Rep. 5 Eq. 249.

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Crosskill, Henry Frederick Downes, Gregor Grant, Cyrus Legg, Chalmers Izett Paton, A. Rosselli, Angelo Usiglio, and *Charles Wells;* and the names of the bankers, brokers, solicitors, and auditors were also given. The temporary offices of the company were stated to be at 61, *Cornhill.* The objects of the company were set out at considerable length (1), and included the carrying-on of an ordinary banking business, and also the importation and exportation of bullion, and other things not usually included in such a business.

Applications for shares were to be made to the secretary, at the temporary offices of the company, or to the brokers, according to a form of application which was annexed to the prospectus, and was in the following terms:—

"To the Directors of the *Scottish and Universal Finance Bank, Limited.*

"Gentlemen,—Having paid to your bankers, the *Imperial Bank, Limited,* the sum of £50, being a deposit of £1 per share on fifty shares in the above company, I hereby request that you will allot me that number; and I agree to accept such shares, or any less number you may allot to me, to pay the deposit on allotment, and to sign the articles of association of the company when required; and I authorize you to insert my name on the register of members for the number of shares allotted to me."

On the 28th of May, 1864, the Plaintiff, on the faith of the representations contained in the prospectus, filled up the above form as an application for fifty shares, and he sent to the offices of the company this application, along with a cheque for £50, the amount of the deposit-money payable in respect of such shares. The cheque was handed over to the *Imperial Bank,* and by them presented to the Plaintiff's bankers for payment, and was duly paid; and the following receipt for the amount was sent to the Plaintiff:—

"Receipt for Deposit.

"To be retained by the applicant, after being signed by the bankers.

"No.

"Received this 28th day of May, 1864, of *J. Ship,* the sum of

(1) This part of the prospectus will be found set out at length in 2 D. J. S. 545, and Law Rep. 3 H. L. 344.

fifty pounds, being a deposit of £1 per share on application for fifty shares in the *Scottish and Universal Finance Bank, Limited.*

"For the *Imperial Bank.*

"£50. 0*s.* 0*d.* *Geo. Kerby*, jun."

On the 5th of May, 1864, a company was registered under the name of the *Scottish and Universal Finance Bank, Limited.* There were no articles of association, but by the memorandum of association the company was stated to be established for general banking purposes, and for the purchase, importation, and exportation of bullion and specie in all forms. By the memorandum, as it originally stood, the capital was stated to be £1,000,000, divided into 20,000 shares of £50 each; but the two former figures were afterwards struck out, and £2000 capital and 40 shares substituted. This memorandum was subscribed by *William Crosskill* and six other persons.

On the 1st of June, 1864, a document signed by the seven subscribers of the above-mentioned memorandum of association was registered in the Registry of Joint Stock Companies, and by it the subscribers testified that the company registered under the name of the *Scottish and Universal Finance Bank* on the 5th of May was in course of being dissolved, and consented to the registration of another company with the same name, formed under a memorandum and articles of association dated the 1st of June, 1864, with a capital of £1,000,000, divided into 20,000 shares of £50 each. The memorandum and articles of association of this company were registered the same day, and were signed by (amongst others) *H. F. Downes* and *Gregor Grant*, but not by *Crosskill.* The objects of the company so formed were much wider than those defined by the prospectus or the memorandum of the 5th of May (1).

On the same 1st of June, 1864, fifty shares in the company registered on that day were allotted to *Ship*, and his name was entered on the register of members in respect thereof.

On the 14th of June *Ship*, in compliance with the terms of a letter of allotment sent to him by the secretary of the company, paid to the *Imperial Bank* the sum of £200, being the allotment

(1) See them set out at length, 2 D. J. & S. 548; Law Rep. 3 H. L. 345.

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money payable on these fifty shares, and he received an acknowledgment in the following terms:—

"Received on account of the directors of the *Scottish and Universal Finance Bank, Limited,* from *James Ship,* the sum of £200, being the balance of the first payment of £5 per share on fifty shares allotted in this company."

In December, 1864, the company was ordered to be wound up.

In February, 1865, an order was made by Vice-Chancellor *Wood,* directing *Ship's* name to be removed from the register of members, on the ground that the company registered on the 1st of June, 1864, was not that in which *Ship* intended to take shares; and this order was afterwards affirmed by the Lords Justices (1) and by the House of Lords (2).

In June, 1865, the bill in this suit was filed against the seven persons named in the prospectus as directors, and the *Scottish and Universal Finance Bank* and its liquidator. It contained statements to the effect hereinbefore stated, and further alleged that the statements in the prospectus, to the effect that more than half the capital had been subscribed for, were untrue; and that the company proposed by the prospectus to be incorporated had never been incorporated, and that it had now become impracticable to form such a company; and it also alleged that the Defendant company had received the sums of £50 and £200, paid by the Plaintiff as aforesaid, with full knowledge and notice of the means by which the same had been obtained from the Plaintiff. It prayed for a declaration that the Defendants (other than the liquidator) had constituted themselves trustees for the Plaintiff of the sums of £50 and £200 paid by him, and that they were jointly and severally liable to make good to the Plaintiff these sums, with interest at 5 per cent.; and for relief consequential on such declaration.

The cause now came on to be heard.

It appeared that the company in question was projected by a person of the name of *Gunn,* who caused the prospectus on the faith of which the Plaintiff took his shares to be printed and issued, and who appointed one *Raynsford* to act as secretary for

(1) 2 D. J. & S. 544. (2) Law Rep. 3 H. L. 343.

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the projected company. *Raynsford* received and answered all letters containing applications for shares and otherwise relating to the business of the company, down to the 1st of June, 1864; and by the articles of association registered on that day he was named secretary of the company, and he afterwards acted as such. It was admitted that when the prospectus was issued very few applications for shares had actually been received at the offices of the company, but numerous applications were made during the month of May; and on the 28th of that month, when the Plaintiff sent in his application, much more than half of the first issue of 10,000 shares had been applied for. One half of the whole capital of £1,000,000 was not subscribed for either at that time or afterwards.

On the 1st of June, 1864, a meeting of the subscribers of the memorandum of association registered on that day was held, at which shares in the company were allotted to various persons (including the Plaintiff), and the first directors of the company (of whom the Defendants *Crosskill*, *Wells*, and *Downes* were three) were elected. Subsequently, on the same day, a meeting of the directors so elected took place, and was attended by *Crosskill*, *Wells*, and *Downes*. The £50 paid by the Plaintiff was credited by the *Imperial Bank* to the company on the 1st of June, 1864, in an account the first entry in which bore date the 5th of May, 1864.

The Defendant *Crosskill*, by his answer, stated that in May, 1864, he consented to become a director of the company, which was afterwards registered on the 1st of June, and that he signed the memorandum of association registered on the 5th of May with the view of securing to that company the name under which it was registered; that, with this exception, he took no part in the affairs of the company until he attended the meeting of directors on the 1st of June, after the Plaintiff's shares had been allotted to him; that he never in any way authorized or sanctioned the issuing of the prospectus, and did not, in fact, know the terms of it until after the institution of this suit; that he attended the meeting of directors on the 1st of June, 1864, but was told that he was not qualified to act as a director, and, in consequence, he took no part in the proceedings; that he continued a director until November, 1864, when he resigned, but, inasmuch as he resided at *Hull*, was seldom in attendance at board-meetings.

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The Defendant *Legg* never consented to become a director of the company, and never acted as such. Upon becoming aware that his name had been published as that of a director, he wrote to *Gunn* requiring him to abstain from so doing, but he took no steps, by advertisement or otherwise, for the purpose of publicly disclaiming the office.

Downes denied having sanctioned the publication of the prospectus, but admitted that he had received a copy thereof in May, 1864, soon after it was issued. He attended the meetings of the subscribers to the memorandum and the directors on the 1st of June, 1864, and also attended subsequent meetings of the directors down to the 17th of August, 1864. On the 23rd of that month he resigned his office as director.

Wells stated that he was applied to by *Gunn* to become a director of the company, and took time to consider the application. On the 6th of May, 1864, before he had given his consent to act as director, he received some copies of the prospectus, and thereupon wrote to *Gunn*, complaining that his name had been inserted therein without his authority. He denied that he was in any manner concerned in the publication of the prospectus, or that he sanctioned the same. He became a director, but previously to the month of October, 1864, attended only two meetings of directors besides that of the 1st of June, both of which took place shortly after the last-mentioned meeting. In October, 1864, he became dissatisfied with the company, and after making some efforts to have its affairs examined and reported on by a professional accountant, he resigned his office in November, 1864. On the 11th of that month he executed an inspectorship deed, in accordance with the provisions of the *Bankruptcy Act*, 1861.

The bill was dismissed against the Defendants *Grant*, *Paton*, and *Rosselli* previously to the hearing; and an arrangement had been made for dismissing the bill at the hearing as against *Usiglio* without costs.

Mr. *Jessel*, Q.C. (Mr. *Locock Webb* with him), for the Plaintiff:—

In the first place, the Defendants named as directors in the prospectus have taken the money of the Plantiff and given a receipt for it, undertaking to apply it to a particular purpose; they have

not applied it to that purpose, but have handed it over to, or at all events permitted it to be received by, the Defendant company, which under the circumstances must be taken to have had full notice of the manner in which it was obtained from the Plaintiff. That is enough to justify the Plaintiff's title to a decree.

But the matter does not rest there. A company was registered in May, 1864, having objects identical with those for which the Plaintiff paid his money. It is plain that this registration was a mere blind, and that the company so registered was never intended to be actually formed. The case, therefore, falls within the decisions in *Colt* v. *Woollaston* (1), *Green* v. *Barrett* (2), and *Henderson* v. *Lacon* (3).

Again, the prospectus contains a false statement as to the number of shares which had been subscribed for; and on that ground also the persons named therein as directors are personally liable to repay the money obtained from the Plaintiff: *Kent* v. *Freehold Land and Brickmaking Company* (4).

The *Lord Advocate for Scotland* (Mr. *G. Young*, Q.C.) and Mr. *Ferrers*, for *Crosskill*:—

We admit that there was a variance between the prospectus and the memorandum of association registered on the 1st of June, 1864, and that the Plaintiff's name has properly been removed from the register of shareholders. But why is *Crosskill* to be held liable to repay the sums of money the Plaintiff has paid in respect of the shares allotted to him?

It is said that the prospectus contains a material representation, false within the knowledge of the persons who issued it, and by which the Plaintiff was misled. If that be so, there may be some remedy against some one; but in order to make *Crosskill* liable, it must be shewn that he is so connected with the prospectus that the statements therein contained must be taken to be his. But by his answer he expressly denies this, and says that he knew nothing of the prospectus until after the institution of the suit; and there is no evidence in contradiction of this.

(1) 2 P. Wms. 154.
(2) 1 Sim. 45.
(3) Law Rep. 5 Eq. 249.
(4) Ibid. 4 Eq. 588; Ibid. 3 Ch. 493.

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Then it is said that he consented to become, and did become, a director; that he must be taken to have known that a prospectus was issued, and that shares were allotted on the faith of it; and if the statements in it were false he is nevertheless bound. We admit that he became a director on the 1st of June, 1864, and that he is liable to all the consequences which may attach to his having become a director and acted honestly as such; but it is an unheard-of thing to say that by simply becoming a director a man is to be held personally liable for having committed a fraud.

Then it is further said that he has applied the Plaintiff's money to a different purpose from that for which it was intended; and no doubt the person who got the Plaintiff's money is liable. But *Crosskill* did not receive the money. All that is shewn is that the money was paid into the *Imperial Bank*, and then, without any intervention of *Crosskill*, got into the coffers of the company. Neither is *Crosskill* shewn to have done or permitted to be done anything which could make him liable.

But even if he had received the money, it is quite clear that the Plaintiff's remedy is at law, and not in equity: *Stewart* v. *Austin* (1). The case of *Henderson* v. *Lacon* (2) is very distinguishable, and was decided on the ground that the persons who issued the prospectus made statements respecting their own acts which turned out to be untrue, and were held to have been intended to deceive.

Sir *R. Baggallay*, Q.C., and Mr. *C. T. Simpson*, for *Legg*, were not called upon.

Mr. *Mackeson*, Q.C., for *Downes*:—

It was no fraud, such as is cognisable in this Court, to apply the Plaintiff's money to the second company. That is decided by *Stewart* v. *Austin*; and there are *dicta* to the same effect in *Kent* v. *Freehold Land and Brickmaking Company* (3).

Then as to the alleged misrepresentation in the prospectus, *Downes* is in no way answerable for them; he did not issue, or sanction the issue, of the prospectus. But in fact there is no mis-

(1) Law Rep. 3 Eq. 299. (2) Law Rep. 5 Eq. 249.
(3) Law Rep. 4 Eq. 588; see pp. 600, 601.

representation. The statement that more than half the capital had been subscribed for must be taken to refer to the first issue; and if that be the true construction the statement is substantially correct.

Mr. *Nalder*, for *Wells*:—

To establish a case of fraud, you must prove what Lord *Cairns* calls "the *mala mens* putting itself in motion and acting in order to take an undue advantage of a person for the purpose of actually and knowingly defrauding him:" *Patch* v. *Ward* (1). Nothing of the kind is proved here.

Mr. *Fooks*, jun., for the company and the liquidator, relied on *Stewart* v. *Austin* (2); and also contended that the Plaintiff might have obtained such relief (if any) as he was entitled to by applying in the winding-up, and therefore, even if a decree were made in his favour, ought to have no more costs than he would have obtained if he had applied in the winding-up.

Mr. *Jessel*, in reply, contended that the statement in the prospectus as to the amount of capital subscribed for, must be taken to relate to the whole capital, and not to the first issue merely.

He distinguished the case of *Stewart* v. *Austin*, on the ground that in that case the directors took the money innocently and misapplied it; whereas, in the present, they took it nominally for the purpose of applying it to the company registered on the 5th of May, all the while intending to abandon that company, and apply the money to the purposes of another company, which intention they afterwards carried into effect.

[He referred to *Stewart's Case* (3).]

March 21. LORD ROMILLY, M.R.:—

This is a suit praying that, under the circumstances which are stated in the bill, it may be declared that the Defendants have

(1) Law Rep. 3 Ch. 203. (2) Law Rep. 3 Eq. 299.
(3) Law Rep. 1 Ch. 574.

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constituted themselves trustees for the Plaintiff of two sums of £50 and £200 paid by him, and that they are jointly and severally liable to make good to the Plaintiff these two sums, together with interest at the rate of £5 per cent., and that an account may be taken, and that they may be decreed to pay the amount within a short time.

The facts, as far as they are material for the purpose of the decision of this case, are these:—In May, 1864, certain persons desired to found a company called the *Scottish and Universal Finance Bank*. They issued a prospectus in that month, and afterwards registered the company on the 1st of June. I think it unnecessary to refer to the fact that there was a company originally registered on the 5th of May, with a different memorandum of association, which was afterwards withdrawn and the other substituted. The prospectus represented that the company was going to do certain things. The memorandum of association extended very much the objects of the company, and gave the company power to do things which could not have been anticipated from the representation which was made by the prospectus. The result was that when Mr. *Ship* heard of this in the month of December following, at a time when an order had been made to wind up the company, he made a motion under the 35th section of the *Joint Stock Companies Act*, 1862, for the purpose of having his name removed from the list of contributories. The present Lord Chancellor, when Vice-Chancellor, made an order for that purpose; and his decision was affirmed by the Lords Justices and in the House of Lords, and I have carefully read and considered the judgments delivered on those occasions. Afterwards, in June, 1865, Mr. *Ship* filed this bill for the purpose I have already mentioned, namely, to make all the persons named in the prospectus as directors, personally and individually, liable to pay him the amount which he had paid to the company.

I expressed an opinion at the time when this case was argued, and I repeat that expression of my conviction, that for that purpose it must be established that there was by the prospectus a misrepresentation made by the persons sought to be made answerable, knowingly false, and also that it was made by them with a view to deceive, and that it did deceive the Plaintiff. In

my opinion that is the circumstance which they have to establish. *Ship's Case* (1), unquestionably, is one of the highest authority; but what was decided in that case has, in my opinion, nothing at all to do with what has to be decided in the present case. All that that case decided was this: that if you issue a prospectus undertaking to form a company to do certain things, and by the memorandum of association you found a company doing things much more extensive and of much wider application, then a person who has taken shares upon the faith of the prospectus cannot be compelled to remain a member of the company, but may have his name taken off the list of shareholders, or, if the company is wound up, off the list of contributories; and though it is not so stated, I apprehend that it would follow from this that the person who has his name so taken off would be entitled to be repaid by the company the amount that he had paid to the company under that misapprehension. But in that respect he would only be a creditor of the company, and could only prove in case the company was wound up; or in case the company was a going concern, he could bring an action for the amount, and for that purpose it would not be at all necessary to file a bill. But all that would not affect in the slightest degree the individual directors of the company. To make them personally liable, they must have been guilty of a distinct fraud. I think that is established in all the cases. I fully adopt the distinction expressed by Lord *Redesdale* in *Hovenden* v. *Lord Annesley* (2), between fraud properly so called, and what is called constructive fraud, where persons have really been guilty of no moral fraud, but by a species of construction of equity they are said to be guilty of a fraud; in which case Lord *Redesdale* was of opinion that the *Statute of Limitations* would run, and would bar the remedy against them. However, I have nothing to do with that at present. All I have to consider is, whether that is a distinction well founded in these cases. I am of opinion that it is quite established, and I think the two cases that were cited to me, one of which was endeavoured to be explained away, clearly establish the view of the case that I am now taking. They are the cases of *Henderson* v. *Lacon* (3), and *Stewart*

(1) 2 D. J. & S. 545; Law Rep. 3 H. L. 343.

(2) 2 Sch. & Lef. 607, 617.

(3) Law Rep. 5 Eq. 249.

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v. *Austin* (1). In *Henderson* v. *Lacon* (2) the Lord Chancellor (then Vice-Chancellor *Wood*) lays down very distinctly that if the directors make a false representation, knowing it to be false, and if that deceives a person, they are answerable for such misrepresentation, and that accordingly they must be made liable for the consequences; but it must be a material representation. In *Henderson* v. *Lacon* the false representation was this: they stated in the prospectus that the directors and their friends had taken "a large portion of the shares;" and it appeared that so far from a large portion of the capital being subscribed for, even calling every person who had subscribed their friend, there were only about 762 shares taken out of 2500, and that only about 140 shares were subscribed for by persons proved to be their friends. It was absurd to say that that was a correct representation. Then what does the Lord Chancellor say with respect to that? In the first place, he connects all the directors with the issuing of the prospectus. He says, "Now as to the issuing of the prospectus, I have the admission of all the directors that it was issued by their authority." Then the statement was one respecting what they themselves had done. Therefore they knowingly made a representation to the public that they themselves and their friends had subscribed a large portion of the capital, knowing well that at the time when they made that statement the fact was not so, and that they had in fact subscribed nothing but what was merely sufficient to enable them to hold the office of directors; and accordingly, Lord *Hatherley*, if I may be allowed to say so, very properly held that they were all guilty of a fraud, that they had made a false representation which had deceived the plaintiff, and that they were all liable. The case of *Stewart* v. *Austin* is perfectly distinct from that. The plaintiff in that case had been struck off the register of the company by the order of the Court, exactly on the same ground that the Plaintiff's name has been struck off here, namely, on the ground of excess in the objects of the company, as shewn by the memorandum which was registered, over those objects which were stated in the prospectus, and on the faith of which prospectus he took the shares. Then he filed a bill for the return of his deposit against the directors who had issued the prospectus of the company. It is true

(1) Law Rep. 3 Eq. 299. (2) Law Rep. 5 Eq. 249.

he did not allege a fraudulent intention, but if the facts create a fraud, it is perfectly unnecessary to allege the fraudulent intention; nor will the word "fraud" create fraud if the facts themselves do not establish it. Lord *Hatherley* held in that case that there was no fraudulent misrepresentation on the part of the directors at all. They were the agents, no doubt, of the Plaintiff, who had given them the money for the purpose of applying it in a particular manner; and they had applied it in a different manner, that is to say, they had applied it for a more extensive purpose; but that did not constitute a breach of trust on their part for which this Court will give relief. Lord *Hatherley* is distinct and clear upon that subject, and I am unable to distinguish that from the present case. Assuming that there is no misrepresentation in the prospectus (which I am going to refer to in a moment), the case of *Stewart* v. *Austin* (1) lays down exactly the principle applicable here, namely, that making a company extend to objects larger than those specified in the prospectus is a circumstance which entitles a shareholder to have his name taken off the list of shareholders or contributories, as the case may be; but, at the same time, it does not entitle him to go against the directors themselves, and say that they are trustees for him of all the money which the company has received from him. In fact, this is quite a new attempt so far as this is concerned; and of the numerous cases in which this Court has struck out of the register of shareholders the name of a person who has subscribed for shares, on the ground that the objects of the company extended beyond what were published in the prospectus, I do not know a single case where the directors have been made liable where there has not been personal misconduct or fraud of the directors themselves.

What then is the fraud which is here alleged against the directors?—because it comes to that exclusively. The fraud is this, that in the prospectus they used these words: "More than half of the capital being already subscribed for, the list will remain open only a few days, and by a resolution of the board the whole of the remaining shares will be allotted in strict order of application *pro rata*." In the first place, it was attempted to be argued that that extended to the whole original capital, being £1,000,000 in 20,000

(1) Law Rep. 3 Eq. 299.

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shares of £50 each, with power to increase to £5,000,000. But the prospectus says: "First issue 10,000 shares; £1 on application, £4 on allotment, and £5 in three months. It is not intended to call up more than £25 per share." Then it refers to one or two other things, and then comes the passage which I have already read. I am of opinion that this passage extends properly, and according to all grammatical and reasonable construction, to the first issue only, namely, the 10,000 shares, and that it was not intended to apply to the 20,000 shares, but only to the 10,000. Now the prospectus was issued on or about the 3rd of May. At that time there were not more than half the shares subscribed for; but on the 28th of May, before this gentleman applied for the shares, more than half the shares were subscribed for, and not only that, but the whole of the shares were subscribed for before the 1st of June, and many persons were refused shares. Can the Plaintiff be heard to say that this statement misled him, or that he was in any way whatever deceived by it? Supposing he had gone to the company's office, and said, "Is it true that more than half the shares have been subscribed for?" When he went on the 28th of May they would have said, and with perfect truth, "Yes, more than half the shares have been applied for;" for I think more than the whole number had been applied for at that time. It is clear that this company was very much run after; it certainly was not a bubble company at all. It was a company that failed egregiously, for I think it was wound up six months afterwards, like many of these companies; but there can be no pretence for saying that there was anything like *mala fides*, or any of that species of defect which Lord *Cairns*, in the case that was cited to me, very clearly and distinctly laid down as one of the essential ingredients of fraud.

That being so, I am of opinion that there is no fraudulent misrepresentation here. It is not a representation like that in *Henderson* v. *Lacon* (1), that the directors have themselves done something. Further, how are the directors connected with the prospectus? Mr. *Crosskill* by his answer says, "I was in no way party or privy to the preparation, printing, or publication of the said prospectus; I never sanctioned it, and never saw it, and until

(1) Law Rep. 5 Eq. 249.

after the bill in this cause was filed did not know the terms thereof." I am of opinion that upon those words in *Henderson* v. *Lacon* (1), upon which Lord *Hatherley* rests his judgment, it is essential to establish that he had taken some part in this, and that he knew it. As to Mr. *Legg*, he had positively nothing whatever to do with it, and his name was used without his authority. With the exception of Mr. *Downes*, the other persons concerned are very poor, and the Plaintiff has not prosecuted the suit against them. With respect to Mr. *Downes*, I think there is some proof that he knew of the prospectus, but I am of opinion there is nothing whatever proved against him of any fraudulent representation or the like. This seems to have been the view taken by the Lords Justices when *Ship's Case* came before them; for among the papers which were printed for the use of the House of Lords, which are put in evidence in this case, are the shorthand writers' notes of the judgment of the Lords Justices. At the close, after some discussion as to the costs, one of the counsel for Mr. *Downes* says, "Your Lordships have not said anything about the question of fraud." And Lord Justice *Knight Bruce* says, "Not a word;" and Lord Justice *Turner* says, "I may say that I do not think there was any fraud on the part of your clients." The whole case was before them upon that appeal; and Lord Justice *Turner*, a judge who unquestionably was not in the habit of using expressions loosely or lightly, says deliberately, "I am of opinion there was no fraud." He volunteers that remark. And yet this bill is filed immediately afterwards, in order to fix these persons upon the ground of fraud, and upon the ground of making them liable as trustees, which they can only be in case of fraud.

Without going into the details of the evidence, I am of opinion that the case fails, and, as the bill alleges fraud, it must be dismissed with costs.

Solicitor for the Plaintiff: Mr. *S. A. Rice.*

Solicitors for the Defendants: Messrs. *Maynard & Co.;* Messrs. *Harrisons;* Messrs. *Valpy & Ledsam;* Messrs. *Coverdale & Co.;* Mr. *William Ruck.*

(1) Law Rep. 5 Eq. 249.

M. R.

1870

March 8;
April 26.

McHENRY *v.* DAVIES.

Married Woman—Bill of Exchange—Liability of Separate Estate.

A married woman living abroad, alone, under circumstances which led to the belief that she was a *feme sole*, indorsed a bill of exchange, and drew a cheque on her *London* bankers for the purpose of enabling *T.*, who acted as her agent, to raise money. The bill and cheque were cashed by *M.*, a banker at *Paris*, but were dishonoured :—

Held, that the separate estate of the married woman was liable to make good the amount, irrespective of any equities between her and *T.*

THIS was a suit by an English banker at *Paris* against the Defendant, a married woman, to make her separate estate liable for two sums of £146 and £80, being the amount of a bill of exchange and of a cheque which he had cashed for her or her agent.

The Defendant was entitled to considerable property settled to her separate use. She was staying alone at *Paris*, in the year 1867, for some time, for the purpose of medical advice. She was not separated from her husband, but he did not accompany her to *Paris*. The Plaintiff stated that he believed her to be unmarried, as she was to all appearance a *feme sole*. She drew cheques in her own name on her *London* bankers, Messrs. *Robarts, Lubbock, & Co.*, and when they were presented to the Plaintiff for payment he wrote to them to inquire whether she was a responsible person, and they replied that she was a person of the highest standing and respectability, and responsible for a larger amount than that specified.

The Defendant employed a man of the name of *Tyrwhitt* as her agent and amanuensis, who, in February, 1867, presented to the Plaintiff a bill of exchange for £146, drawn by him upon Messrs. *Foster & Payne* of *London*, payable three months after date, and indorsed by the Defendant. The Plaintiff, relying on the Defendant's solvency, discounted the bill, and gave the proceeds to *Tyrwhitt*.

During the currency of the bill, *Tyrwhitt* presented to the Defendant a cheque for £80, drawn by the Plaintiff, on the 27th of March, 1867, on her *London* bankers, payable to *Tyrwhitt* or bearer, which the Plaintiff also cashed.

Tyrwhitt was insolvent. The bill was dishonoured at maturity, and the cheque was refused payment by the *London* bankers, who had received orders from the Defendant in the meantime not to pay the sums in question.

The Plaintiff took proceedings in the French Court to recover the amount against the Defendant, but she pleaded coverture, and he was unsuccessful. His present bill, which was originally filed in the Mayor's Court, prayed that the Defendant might be declared to be indebted to the Plaintiff in respect of the two sums, and liable to make good the amount out of her separate estate.

The principal defence to the suit was that the Defendant indorsed the bill and signed the cheque to enable *Tyrwhitt* to raise money upon them; that *Tyrwhitt* was indebted to her; that the charge (if any) against her separate estate was in equity, and was therefore subject to equities, and to making good what *Tyrwhitt* owed her; and that an account must, therefore, be taken between *Tyrwhitt* and herself. There were also various technical grounds of defence; one of which was, that the bill of exchange was a foreign bill, and was subject to a foreign law, the requisites of which had not been complied with.

The suit was removed by *certiorari* from the Mayor's Court.

Mr. *Swanston*, Q.C., and Mr. *Jackson*, for the Plaintiff, contended that as the Defendant, when she indorsed the bill of exchange and signed the cheque, was living apart from her husband, and, to all appearance, a *feme sole*, and the Plaintiff had advanced the money on that supposition, and without being aware that she was married, her separate estate was liable to make good the amount. They referred to *Johnson* v. *Gallagher* (1), *Matthewman's Case* (2), and *Picard* v. *Hine* (3).

Mr. *Jessel*, Q.C., and Mr. *Freeling*, for the Defendant, contended that these sums were not a charge upon her separate estate at all, and, if they were, they were subject to the equities between her and *Tyrwhitt*, as the Defendant put her name to the documents merely for the purpose of enabling *Tyrwhitt* to raise money.

(1) 3 D. F. & J. 494. (2) Law Rep. 3 Eq. 781. (3) Law Rep. 5 Ch. 274

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They referred to *Shattock* v. *Shattock* (1), and *Vaughan* v. *Vanderstegen* (2).

Mr. *Swanston*, in reply.

April 26. LORD ROMILLY, M.R.:—

This suit is instituted by an English banker at *Paris* to compel the Defendant, out of her separate estate, to make good two sums of money, one of £146 and the other of £80, which, as the Plaintiff alleges, were cashed by him for her or her agent.

The law is quite settled to this extent, that though a married woman cannot enter into a contract, she can charge her separate estate; but as this separate estate and the charges on it are the creatures of equity, the charges must be subject to the equities, if any; but this does not mean indiscriminate equity, which would enable a person who owed money to a married woman to obtain money from others under the erroneous belief that they would have the security of her separate estate. It is always a question of fact, and the circumstances must first be considered in order to determine what legitimate inferences may be drawn from them. [His Lordship then stated the facts as to the bill of exchange, and continued:—]

I am of opinion that, as between a single woman and the Plaintiff, she would be liable to make good to the Plaintiff the money he advanced on the faith of her signature, and this quite independently of any technicality as to the fact whether the bill were an English or a foreign bill. But upon the simple facts that an English lady, possessed of separate property, in order to enable her agent to raise money, signs her name on a piece of paper, intimating that she will be liable to pay the amount, I am of opinion that when he has so raised the money, on the faith of the credit given by the signature of her name, she cannot afterwards dispute her liability, and say that she is not liable to make good the amount out of the property at her disposal.

[His Lordship then stated the facts as to the cheque for £80, and

(1) Law Rep. 2 Eq. 182. 35 Beav 489; 12 Jur. N.S. 405. (2) 2 Drew. 165.

expressed his opinion that, as to that, she could not now dispute her liability.]

I am of opinion that all the technical defences have nothing to do with the case, which rests entirely on equitable principles. It is a fundamental principle of equity, that if a *feme covert* employs a person in the situation of *Tyrwhitt* to act as her agent and amanuensis, and afterwards gives documents to the same person, with her name on them, for the express purpose of enabling him to raise money on the credit of her name, she is liable to make good out of her separate estate, to the person advancing money on the faith of her name, the amount which he has so advanced. Were it otherwise, it would be merely making this Court a party to defrauding an innocent man out of money which he could have no notice or suspicion would not be repaid. How is he, in the absence of express information, to know for whom the money is required, or subject to what conditions, as between herself and her servant, the documents are intrusted to him? In my opinion there are only two things which are necessary to be proved in this case: the first is, that the money was given on the credit of the Defendant's name, with her knowledge and sanction; and the second is, that by her actions she held herself out as a *feme sole*, or, at least, as a woman whose separate property would repay advances made to her.

The first proposition is, in my opinion, abundantly proved by the evidence in the cause; the second proposition is also, in my opinion, established.

Here is a lady, not indeed legally separated from her husband, but residing alone in *Paris* for above three months for the benefit of medical advice, having a separate account at her bankers, paying her bills and accounts, and the like, with her own money, and acting like a woman who had no husband. Everything about her tending to confirm this impression, I think that she cannot afterwards be heard to say that she was a *feme covert*, and that she is not liable to have her separate property applied to make good the money that was paid to her or for her benefit. I adopt the expression of Lord Justice *Turner*, in *Johnson* v. *Gallagher* (1), where, referring to a married woman who, having separate estate and

(1) 3 D. F. & J. 521.

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living apart from her husband, contracts debts, His Lordship observes, "The Court is bound to impute to her the intention to deal with her separate estate unless the contrary is clearly proved."

I am of opinion that a decree must be made in substance according to the prayer of the bill, for an inquiry as to what the separate estate of the Defendant consists of, and for an account of what is due to the Plaintiff on the bill and cheque, and payment to him out of the Defendant's separate estate of the amount so found due, and also the costs of the suit.

Solicitor for the Plaintiff: Mr. *Rowland Miller.*

Solicitors for the Defendant: Messrs. *Cookson, Wainewright, & Co.*

M. R. 1870 *April* 29; *May* 4.

BRIGGS *v.* JONES.

Mortgage—Priority—Mortgagee parting with Title Deeds.

B., a mortgagee of leasehold property, lent the lease to the mortgagor for the purpose of raising money upon it, but at the same time told the mortgagor to inform the person from whom he proposed to borrow the money that *B.* had a prior charge. The mortgagor borrowed money from his bankers upon the security of a deposit of the lease without giving them notice of *B.*'s mortgage:—

Held, that *B.*'s mortgage must be postponed to that of the bankers.

THIS was a foreclosure suit.

By a deed, dated the 19th of September, 1866, the Defendant, *Edward Jones*, mortgaged a piece of land at *Caerphilly*, in *Glamorganshire*, and a foundry and building thereon, which he held under a lease for ninety-nine years from the 25th of March, 1866, to the Plaintiff to secure the repayment to the Plaintiff of £250 advanced by him to *Jones*, with interest thereon at 6 per cent. per annum, and also interest at the rate of 5 per cent. per annum on the amount of the net profits which *Jones* might make in his business of an ironfounder and commission agent.

On the 6th of January, 1868, *Jones*, having been pressed by *John Ellis*, a brother-in-law of the Plaintiff, for payment of a debt

which he owed to *Ellis*, wrote to the Plaintiff the following letter:—

"I inclose a letter from Mr. *Ellis*, by which you will find that he requires the repayment of the amount invested with me. Now, I wish to have your advice in the matter. Of course it is quite evident that the speculation has and will realize my expectations. Now, I can get my banker here to advance me a sum of from £700 to £900 on the place merely by depositing the lease. Of course he knows all my transactions, and how I am situated in regard to Mr. *Ellis*; so I wish you to give me your opinion, and also if you wish to have your account repaid, which, of course, I could do that in this case. If you think I would better come over and see you, please let me know by return, as I am very anxious to get the matter settled." And on the 17th of January he again wrote to the Plaintiff, as follows: "Will you kindly let me have the lease, so that I can get the amount required to pay him (*Ellis*)? Of course I shall not do anything, only through my lawyers, and they shall write to you on the subject; but I hope you have confidence enough in me now to think that I shall not do anything but what will be to my advantage, as there is no doubt I have been doing well, considering the disadvantage of starting a new business."

On the 4th of February the Plaintiff replied as follows:—

"If you wish to have your lease sent down for the purpose of having a second mortgage made out, or pay me off, whichever you prefer, I will send it to my solicitor's agents in *Cardiff*, where your solicitor will have access to it."

On the 29th of April, 1868, *Jones* wrote to the Plaintiff as follows:—

"I have now got a very respectable person, a retired gentleman, that was out with me in *India*, to advance me £600. . . . The gentleman wishes to see the lease of the land. I therefore beg you will kindly let me have the lease, and I trust you have now confidence in me that I would not attempt to do anything but what I carry out honourably; and I am anxious to let Mr. *Ellis* have his money now he requires it. I could manage to pay half

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of yours if you desire it, but I would prefer keeping it another twelvemonth if you will agree to it."

On the 30th of April, *Ellis* wrote to the Plaintiff as follows:—

"*Jones* has called upon me this day in reference to the repayment of your money and mine. A gentleman named *Jackson*, whom I mentioned to you when I was in *Manchester*, is willing to advance the money. He asked to see the lease, and *Jones* thinks it would look much better if he could produce it himself, as Mr. *Jackson* might think that he was raising money in every quarter. *Jones* is doing a very fair business now, and is unwilling to be stopped for the want of a little money. Almost all his outlay is completed, and he is beginning to receive profits. . . . Will you send the lease to me, and I will guarantee that the £250 shall be paid to you."

On the 1st of May the Plaintiff wrote to *Jones* as follows:—

"My solicitor is loth to part with the lease, as he considers it spoils my security to some extent. However, I have every confidence in you; and, moreover, *John Ellis* says in his letter he guarantees me; so I defy my lawyer, and send you the lease by Mr. *Ellis* on the understanding that it is returned to me within a certain specified period of time, say four days, which I suppose will be enough for you to decide in. . . . As regards my money, I leave it to you whether you will pay it off or not at present. First, you will have to inform Mr. *Jackson* that I have a first mortgage over your property." And on the same day he wrote to *Ellis* as follows: "I have written *Jones*, telling him that, contrary to my solicitor's advice, I am going to send his deed by you, you guaranteeing me from any loss by so doing, and on condition that it be returned within four days into your hands for me. That would be enough, I should think, to enable Mr. *Jackson* to decide whether or no he would advance the money on security of a second mortgage, mine being the first mortgage. . . . Of course you know that parting with the deed weakens my security considerably."

On the 6th of May the Plaintiff sent the lease to *Ellis*, and by a letter of the 9th of May authorized him to retain it for a month.

On or about the 29th of May, *Ellis* gave the lease to *Jones*, and on the 1st of June, *Jones* obtained a loan from his bankers, the *Provincial Banking Corporation, Limited*, with whom he had previously an overdrawn account, by depositing with them the lease, with the following memorandum: "I hereby deposit the lease of my premises at *Caerphilly* with the *Provincial Banking Corporation, Limited*, as security for my overdraw upon them."

On the 30th of July, 1868, *Jones* executed a mortgage of the premises to *Joseph Evans*, the manager of the bank, to secure the amount due to the bank on his account-current. The bank had no notice of the Plaintiff's mortgage until the 20th of August, 1868. *Ellis* several times in June and July, 1868, applied to *Jones* to return the lease to him, but *Jones* put him off with various excuses. The Plaintiff did not discover that the lease had been deposited with the bank until September, 1868.

In October, 1868, *Jones* executed an assignment of his property to *Evans* and *Ellis* in trust for his creditors, which was registered under the *Bankruptcy Act*, 1861.

In January, 1869, the Plaintiff instituted this suit against *Jones*, the bank, *Evans*, and *Ellis* for foreclosure.

Jones and *Ellis* had gone to *India*, the former before, the latter soon after, the institution of the suit.

The bank insisted that they were entitled to priority over the Plaintiff, on two grounds:—First: That the Plaintiff had, by lending the lease to *Jones*, enabled him to raise money upon it without notice of the Plaintiff's mortgage. Secondly: That by reason of the provision as to interest in the Plaintiff's mortgage, and of *Jones'* *quasi*-bankruptcy, the claim of the Plaintiff must, under the 5th section of the Act to amend the law of partnership (28 & 29 Vict. c. 86), be postponed to the claims of all the other creditors of *Jones*.

The amount due to the bank on their mortgage exceeded the value of the mortgaged property.

Mr. *Jessel*, Q.C., and Mr. *Atkin*, for the Plaintiff:—

The mere circumstance of parting with the title-deeds, unless there is fraud or gross negligence amounting to evidence of fraudulent intention, is not a sufficient ground for postponing a first

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mortgage: *Evans* v. *Bicknell* (1); *Martinez* v. *Cooper* (2). Here there has been neither fraud nor gross negligence on the part of the Plaintiff. He parted with the lease upon the representation of *Jones* that it was wanted for the purpose of shewing it to *Jackson*, from whom *Jones* was about to borrow money on a second mortgage, and on the understanding that it was to be returned in a few days, and he expressly charged *Jones* to inform *Jackson* of his mortgage. He had no reason to suppose that *Jones* intended to use the deed for the purpose of deceiving anybody, and probably *Jones* had no such intention when he asked for it, but yielded to the sudden temptation to deposit it with his bankers. The Plaintiff, through his agent *Ellis*, continually applied to *Jones* to return the lease.

They also contended that the terms of the mortgage-deed did not come within the provisions of 28 & 29 Vict. c. 86, and that the 5th section of the Act did not affect the right of a mortgagee to foreclosure; but as no decision was given on these points, the argument is omitted in this report.

The MASTER OF THE ROLLS, at the conclusion of the argument of the Plaintiff's counsel, said that he would read the evidence, and then, if he should think it necessary, hear the counsel for the Defendants.

Mr. *Southgate*, Q.C. (Mr. *B. B. Rogers* with him), for the Defendants, the bank and *Evans*, referred to *Perry-Herrick* v. *Attwood* (3).

May 4. LORD ROMILLY, M.R.:—

I will not trouble you, Mr. *Southgate*, in this case, because I am of opinion, independently of the question of law, that upon the question of fact the Plaintiff is not entitled to recover.

The question has been raised whether this case comes within the Act of Parliament (28 & 29 Vict. c. 86), and whether, if it does come within the Act of Parliament, the 5th section of the Act applies to it, that is to say, whether a bill for foreclosure is a

(1) 6 Ves. 174, 190. (2) 2 Russ. 198.
(3) 25 Beav. 205; 2 De G. & J. 21.

suit to recover money or not. I think it unnecessary to go into those questions, because I am of opinion, upon the facts, that it is clearly established that Mr. *Briggs* lent this lease to Mr. *Jones* for the express purpose of raising money. He did, no doubt, not intend that Mr. *Jones* should deceive anybody, because he expected Mr. *Jones* to tell any person from whom he raised the money that there was a prior charge upon the property; but he lent the lease to him, as I shall shew by the correspondence and the evidence, for the express purpose of enabling him to raise money upon it. *Jones* deceived the persons from whom he raised the money, and he has deceived Mr. *Briggs* too. He could not have raised any money at all upon the lease if he had informed Mr. *Evans* of the prior charge, but he concealed that when he deposited the lease.

This is also to be observed, that if it had been the mere inspection of the lease that was wanted, the inspection could have been made just as well at the office of Mr. *Briggs*, or at the office of his solicitor, as anywhere else; but if it was wanted to make a deposit, then no doubt it was very important that *Jones* should have the lease to be able to deposit it. He intended to raise money sufficient to pay off all charges, but he never did that. Accordingly, not only has he taken in the bank, but Mr. *Briggs* has allowed him to do so, because Mr. *Briggs* has given him the deed for the purpose of raising money. Mr. *Briggs* trusted to him to tell the person from whom he raised the money that he, Mr. *Briggs*, had a prior charge upon it, but this *Jones* did not intend to do.

The letters are, I think, conclusive upon the subject:—[His Lordship read the letters of *Jones* to the Plaintiff of the 6th and 17th of January, 1868, and continued:—] It is to be remembered also, that *Ellis* was trying to assist Mr. *Jones*. On the 29th of April *Ellis* wrote to the Plaintiff to this effect: "A gentleman named *Jackson*, who I mentioned to you when I was in *Manchester*, is willing to advance the money" (that is the money to Mr. *Jones*). "He asked to see the lease, and *Jones* thinks it would look much better if he could produce it himself, as Mr. *Jackson* might think that he was raising money in every quarter. *Jones* is doing a very fair business now, and is unwilling to be stopped for the

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want of a little money; almost all his outlay is completed, and he is beginning to receive profits." That is expressly an application that he should produce the lease for the purpose of deceiving Mr. *Jackson* into the belief that he would raise no other money. Then on the 1st of May, Mr. *Briggs* writes thus to *Jones*:—[His Lordship read the letter, and continued:—] It is quite clear, therefore, that his lawyer told him, "You will damage your security very much if you let him have this lease;" but he set his lawyer at defiance, and why? Because *Ellis* had indemnified him, according to his statement. He trusted to his indemnity, and he sent the lease to *Jones* for the express purpose of raising the money. No doubt he told him "You must tell Mr. *Jackson* that I have got the first charge on this property." But supposing *Jones* did not tell *Jackson*, but deceived *Jackson*, who would be to blame for it? Would not Mr. *Briggs* be to blame for it? It is unnecessary for me to go through the whole of the circumstances in detail, but what *Jones* did was this: he raised the money from his bankers, he deposited his lease, and he never said a word about the prior charge.

I have had to consider this point quite recently in the case of *McHenry* v. *Davies* (1), where money was raised upon a bill drawn by a lady in *Paris*. A person who puts it in the power of another to deceive and to raise money, must take the consequences; he cannot afterwards rely on a particular or a different equity. This is a case exactly of that description. In the case to which Mr. *Southgate* referred of *Perry-Herrick* v. *Attwood* (2) I acted entirely upon that principle. In that case there were two ladies, who being prior mortgagees, unfortunately allowed their brother, Mr. *Attwood*, to have the deeds for the purpose of giving priority to a particular charge. Instead of giving priority to that particular charge only, he borrowed other money, and the question was, whether his sisters were not to be postponed to the persons from whom he borrowed money. I held that they were, and the Lord Chancellor affirmed my decision.

The result is that, in my opinion, the Plaintiff's case fails. He can either have a decree to redeem, if he thinks fit, with the usual consequences, or he can have his bill dismissed with costs. In

(1) *Ante*, p. 88. (2) 25 Beav. 205; 2 De G. & J. 21.

any event he must pay your costs, Mr. *Southgate*, up to the hearing.

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Mr. *Jessel* elected to have the bill dismissed.

Solicitors for the Plaintiff: Messrs. *Chester & Urquhart*, agents for Mr. *T. L. Farrar, Manchester.*

Solicitors for the Defendants: Messrs. *Brodrick & Gray*, agents for Mr. *D. W. Davis, Cardiff.*

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Feb. 17, 18; *April* 21.

Equitable Estate Tail—Words "dying without Issue"—Statute of Limitations (3 & 4 Will. 4, c. 27), s. 23—Suit to recover Possession of Estate.

A settlor conveyed an estate to trustees to the use of himself for life, with remainder to the use of *D.*, his heirs and assigns, but if *D.* should die without issue, then to the use of *T.*, his heirs and assigns, and if both *D.* and *T.* died without issue, then to the issue male of the settlor.

D. died without issue in the lifetime of *T.*, who afterwards died intestate, leaving *X.*, his only son, him surviving. The settlor survived *T.*, but died in the lifetime of *X.*:—

Held, that *T.* took an equitable estate tail.

More than twenty years before the filing of the bill, and after the death of the settlor, *X.*, under a mistake as to his rights, executed a conveyance of the estate to a Defendant, who immediately entered into possession. This deed was not inrolled. The only son of *X.* filed this bill eight years after the death of *X.*, and one year after attaining twenty-one:—

Held, that his claim was not barred by the *Statute of Limitations* (3 & 4 Will. 4, c. 27), s. 23, and that he was entitled to have the property delivered up to him, with an account of rents from the filing of the bill, as in *Penny* v. *Allen* (1).

THE object of this suit was to recover possession of an estate called *Penylan*, sold by the father of the Plaintiff to his uncle, the Defendant *Rees Morgan* the younger.

By a settlement of the 29th of November, 1791, made after the marriage of the great-grandfather of the Plaintiff, the estate was conveyed to trustees and their heirs to the use of *Rees Morgan*, the settlor, for life, with remainder to the trustees, in order to secure

(1) 7 D. M. & G. 409, 428.

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an annuity to the wife of the settlor during her life in lieu of dower, and subject thereto to the use of *David Morgan*, the eldest son of the settlor, his heirs and assigns; but if he died without issue, then to *Thomas Morgan*, the second son, his heirs and assigns; and if both *David Morgan* and *Thomas Morgan* died without issue, then to the male issue of *Rees Morgan*, the settlor; and if there should be no male issue, then to his daughters.

David Morgan, the eldest son, died, in 1815, intestate and without issue, and without having in any way dealt with the estate.

Thomas Morgan, the second son, died intestate in 1824, leaving *David Morgan* the younger, his only son, him surviving.

Rees Morgan, the settlor, survived his two eldest sons, and died in February, 1842, leaving *Rees Morgan* the younger, the Defendant, his youngest son, and also the said *David Morgan* the younger, his grandson and heir-at-law, him surviving.

David Morgan the younger died in 1860, leaving the Plaintiff, *Thomas Morgan* the younger, his only son and heir-at-law and in tail, him surviving, who attained twenty-one in 1867, and in 1868 filed his bill against the Defendant *Rees Morgan* the younger, and his mortgagees, claiming to be entitled to the estate.

The Plaintiff's claim was contested by the Defendants, who made out their title thus:—

In 1820, during the life of his father the settlor, *Thomas Morgan* the elder purported to convey the reversion in fee in the *Penylan* estate to *D. L. Harries*, his heirs and assigns, but did no act to bar an estate tail. In 1842, on the death of the settlor, *Harries* entered into possession of the property, and in September, 1847, sold and conveyed it to the Defendant *Rees Morgan* the younger. *David Morgan* the younger (the Plaintiff's father) joined in this deed of conveyance, and thereby, after reciting that he had a claim to the property as heir-at-law of *Thomas Morgan* the elder, and that in order to avoid disputes the said *Rees Morgan* the younger had agreed to give him £5 for joining in the conveyance, he purported in consideration thereof to grant, release, and confirm the said *Penylan* estate to the said *Rees Morgan* the younger, his heirs and assigns, for ever. This deed was not inrolled, and no disentailing assurance was executed affecting the property.

In October, 1847, *Rees Morgan* the younger executed a mort-

gage of the estate, and the Defendants *Mary Thomas* and *Rachel Williams*, were the present mortgagees.

The principal questions in the case were: what estate *David Morgan* the elder and *Thomas Morgan* the elder took in *Penylan*, and whether the Plaintiff's claim was barred by the *Statute of Limitations* (3 & 4 Will. 4, c. 27).

Sir *R. Baggallay*, Q.C., and Mr. *Woodhouse*, for the Plaintiff:—

First: We contend that, on the proper construction of the deed of November, 1791, *David Morgan* the elder, and *Thomas Morgan* the elder, took equitable estates tail in the *Penylan* estate. The estate was conveyed, subject to the life-interest of the settlor, to trustees to the use of *David Morgan* the elder, his heirs and assigns; but if he died without issue, then to the use of *Thomas Morgan* the elder, his heirs and assigns; and if both died without issue, then over.

This construction is in accordance with a *dictum* of *Gould*, J., in *Fisher* v. *Wigg* (1): "A grant to a man and his heirs, but if he dies *sans* issue, &c.—this turns the fee in the premises to an estate tail, and corrects the generality of the preceding words." In *Bamfield* v. *Popham* (2), *Powell*, J., observed (3): "If a man does by deed give lands to *A.* without expressing any estate, and afterwards adds the words 'if *A.* die without issue, then to *B.*,' this makes an estate tail." In *Idle* v. *Cook* (4) a surrender of copyholds to the use of *Valentine* and *Alice* for their lives, and their heirs and assigns, and for want of such issue to the right heirs of the surrenderor, was held to confer an estate in fee, and not an estate tail; but that case is not inconsistent with the *dictum* in *Fisher* v. *Wigg*, for the decision rested upon the words "such issue"; and *Holt*, C.J., observed (5): "If it had been said, 'If *Valentine* and *Alice* die without issue of their bodies,' that, being express and particular, would have made it an estate tail." On these authorities it is clear that each of the estates in remainder under the deed was an equitable estate tail. This being so, we contend that the Plaintiff, the grandson and heir in tail of *Thomas Morgan* the elder, who survived his brother, and died in 1824, is now entitled to the estate.

(1) 1 P. Wms. 14, 15.
(2) Ibid. 54.
(3) 1 P. Wms. 57.
(4) Ibid. 70.
(5) 1 P. Wms. 78.

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It is contended on the part of the Defendants that the Plaintiff's claim is barred by the *Statute of Limitations*, as the bill was not filed till 1868, and there has been more than twenty years' adverse possession. But the 23rd section of the *Statute of Limitations* is only applicable where some act has been done which is effectual to bar the issue of the tenant in tail; whereas the deed executed by *David Morgan* the younger, in September, 1847, was only an imperfect assurance, and was not inrolled, and it only passed his own life estate: *Penny* v. *Allen* (1). The effect of the statute in analogous cases was considered by Lord *St. Leonards* in his Treatise on the Statutes relating to Property (2); *Rimington* v. *Cannon* (3); *Austin* v. *Llewellyn* (4). On the principles laid down in these cases we submit that the *Statute of Limitations* has no application to the present case, and that the Plaintiff is now entitled as heir in tail of *Thomas Morgan* the elder, and is entitled to possession of the property, and to an account of the mesne rents and profits since the death of *David Morgan* the younger.

Mr. *Everitt*, for the Defendant *Rees Morgan* the younger.

Mr. *Jessel*, Q.C., and Mr. *Bevir*, for the mortgagees:—

The deed of 1791 did not create estates tail in *David* and *Thomas Morgan*, but operated as a gift to *David* in fee, with a contingent gift over to *Thomas Morgan* in fee in the event of his dying without issue, and a similar limitation, in the event of both dying without issue, to the male issue of the settlor.

The case of *Idle* v. *Cook* (5) was a case on the surrender of copyholds, where the rules of construction are less strict than in cases of freeholds. But in that case the opposite construction to that contended for by the Plaintiff was maintained, so that it is rather an authority in the Defendant's favour. The case of *Fisher* v. *Wigg* (6) turned on a tenancy in common, and the words relied on were only a *dictum* taken from the Year-Book (7). The Plaintiff's counsel also rely on *Bamfield* v. *Popham* (8); but that case arose under a

(1) 7 D. M. & G. 409.
(2) 2nd Ed. p. 87.
(3) 12 C. B. 18.
(4) 9 Ex. 276.
(5) 1 P. Wms. 70.
(6) Ibid. 14.
(7) 19 Hen. VI. 74.
(8) 1 P. Wms. 54.

will, and the passage cited is not an authority for cutting down an estate in fee to an estate tail by ambiguous words.

Further, the Plaintiff's claim is barred by the *Statute of Limitations*. Time began to run from the death of the settlor, who was tenant for life in 1842, when *Harries* entered into possession under an adverse title, derived under the conveyance by *Thomas Morgan* the elder, in 1820, whereby all his interest in the property passed to *Harries*: *Co. Litt.* (1); *Machell* v. *Clarke* (2). This, then, was the date when adverse possession commenced, which would continue to run till the present time: *Goodall* v. *Skerratt* (3). By the 21st section of the *Statute of Limitations* it is provided that where a tenant in tail is barred, the remainderman, whom he might have barred, shall not recover; and sect. 23 provides that where there has been an assurance by a tenant in tail which shall not bar the remainders, and there has been adverse possession under such assurance for twenty years, it shall be effectual against any person claiming in remainder.

The deed of 1847 did not pass the equitable interest of *David Morgan* the younger, but only the legal estate; that deed, though not inrolled, passed a base fee defeasible by the entry of the issue in tail, and as more than twenty years have elapsed since that deed was executed the claim of the Plaintiff is now barred.

Sir *R. Baggallay*, in reply.

April 21. LORD ROMILLY, M.R., after stating the facts of the case, continued:—

The first question is, what estate *David Morgan* the elder and *Thomas Morgan* the elder took in the *Penylan* property; and after considering the cases, and especially the case of *Fisher* v. *Wigg* (4), and the cases there cited, and notwithstanding the case of *Idle* v. *Cook* (5), which seems at first inconsistent with it, I am of opinion that *David* and *Thomas Morgan* each took an estate tail in the premises, and that unless they or one of them did some

(1) 331 a.
(2) 2 Ld. Raym. 778; 2 Salk. 619.
(3) 3 Drew. 216.
(4) 1 P. Wms. 14.
(5) 1 P. Wms. 70.

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act to destroy the entail, it went to the issue of *Thomas Morgan* the elder, as tenant in tail general.

The principal defence set up is the 23rd section of the *Statute of Limitations*. This section provides for cases where a tenant in tail in remainder has executed an assurance, which would have barred all persons entitled in remainder if he had at that time been tenant in tail in possession, and accordingly in that event it bars all such persons interested in remainder at the end of twenty years from the first time at which the tenant in tail, or some person claiming under the entail, would have been entitled in possession to the estate tail.

But this section has no application to this case. *Penny* v. *Allen* (1) decides that it applies only to assurances which are effectual to bar the issue in tail. But the conveyance by *David Morgan* the younger, the father of the Plaintiff, was not inrolled, and had no such effect. In addition to which it is to be observed that *David Morgan* the younger, when he executed the deed, never believed that he was conveying, or intended to convey, the *Penylan* estate away from himself and his issue to his uncle. And the conveyance of the reversion by *Thomas Morgan* the elder, in 1820, during the life of his father had no operation at all in depriving the Plaintiff and his father of the estate in remainder.

I must therefore make a decree for delivering up of possession of the estate and of the title-deeds, but I shall follow the precedent of *Penny* v. *Allen* (2), and direct an account of the rents only from the date of the filing of the bill.

Solicitor for the Plaintiff: Mr. *E. Balden*, agent for Mr. *Atwood, Aberystwith.*

Solicitors for the Defendants: Mr. *T. Clarke*, agent for Mr. *T. Jones, Llandovery;* Messrs. *G. L. P. Eyre & Co.*, agents for Mr. *J. P. Lewis, Llandilo.*

(1) 7 D. M. & G. 409.

(2) 7 D. M. & G. 428.

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Feb. 11, 16, 28; March 1, 2; April 25.

Right of Common—Bill on behalf of Freeholders of Manor—Frame of Suit—Evidence of Right—Burden of Proof—Custom and Prescription—Interruption—2 & 3 Will. 4, c. 71—Right of Recreation.

A suit for the purpose of establishing a right of common over the wastes of a manor may be maintained by one freehold tenant of the manor on behalf of himself and all other freehold tenants.

It is not incumbent on the Plaintiff in such a suit to prove that a right of common was granted at the same time as the land; but the Court will presume the grant where the user has been long-continued and uninterrupted, and the burden of proof lies on the lord who seeks to disturb the long-continued user.

Where the lord has attempted to stop the user of a common, the fact that some of the tenants have yielded to such attempts is not an interruption of the right within the meaning of the *Prescription Act* (2 & 3 Will. 4, c. 71), so as to bar the rights of freeholders who, as a body, have never yielded to, or acquiesced in, the claim of the lord.

Discussion as to claims to a right of recreation over a common.

Whether freehold tenants can claim by custom, *quære*.

Earl of Dunraven v. *Llewellyn* (1) considered.

THIS was a suit by *John Warrick, Julian Goldsmid, William Edward Dawson*, and *Joseph Jacobs*, on behalf of themselves and all other the tenants of the manor of *Plumstead*, against the Provost and Scholars of *Queen's College*, in the University of *Oxford*, and the Rev. *William Jackson*.

The manor of *Plumstead* is an ancient manor, situate partly in the parish of *Plumstead* and partly in the parish of *East Wickham*, in the county of *Kent*, and now belongs to the Provost and Scholars of *Queen's College*. It comprises freehold tenements to the extent of about 400 acres, but no copyholds.

The Plaintiffs *Warrick, Goldsmid*, and *Dawson* respectively claimed to be freehold tenants of lands held of the manor, and the Plaintiff *Jacobs* claimed to be a lessee for years of lands so held. The Defendants admitted that the Plaintiff *Warrick* was entitled, for an estate of freehold, to an ancient orchard held of the manor; that the Plaintiff *Dawson* was entitled, for a like estate, to a parcel of land, now covered with houses, also held of the

(1) 15 Q. B. 791.

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manor; but they denied that the Plaintiffs *Goldsmid* and *Jaco* held any lands of the manor.

Within the manor are three commons: *Plumstead Common,* containing about 110 acres; *Bostal Heath,* containing about 55 acres; and *Shoulder-of-Mutton Green,* containing between three and four acres.

The bill alleged that for a period of thirty years next before the acts of the Defendant college thereby complained of—and, in fact, commencing at such time that the memory of man runneth not to the contrary—the predecessors in title of the Plaintiffs, and the Plaintiffs and the other freehold tenants of the manor, had enjoyed, as of right and without interruption, the following common rights, as to the right to pasture for commonable cattle, appendant, and as to all other rights of pasture and the other common rights, appurtenant to their several tenements held of the lords of the manor: viz. (1) A right of pasture upon the three commons for all sorts of cattle levant and couchant, as well commonable as others, and a right to feed geese, ducks, and suchlike birds upon *Shoulder-of-Mutton Green;* (2) A right of estovers, and hay-bote, and wood-bote, and turbary, to cut so much turf, furze, gorse, fern, and underwood, upon *Plumstead Common* and *Bostal Heath,* as might be required for fuel to be consumed upon their tenements, and for the purpose of fodder and litter for cattle levant and couchant on their tenements, and for other purposes of agriculture and husbandry necessary for the beneficial and profitable enjoyment and use of their tenements, and to dig so much loam, sand, and gravel upon the said commons as may be required or necessary for the beneficial enjoyment of their tenements; (3) A right to use the whole of the three commons for walking, driving, and riding on horseback, and for the enjoyment of air and exercise, and for amusement and recreation, and particularly as to *Shoulder-of-Mutton Green,* a right to use the same for all lawful village sports, games, and pastimes; and (4) other rights, privileges, and customs.

The bill also contained allegations to the effect that in or about the year 1866 the college inclosed various parts of *Plumstead Common* and *Bostal Heath,* and inclosed nearly the whole of *Shoulder-of-Mutton Green,* and stopped up ancient paths over the commons; and also, about the same time, entered into negotiations with the War Department of Her Majesty's Government, for the lease to them of a considerable portion of *Plumstead Common,*

as a practice-ground for artillery, cavalry, and infantry; and that it was intended to erect houses and other buildings on the lands so inclosed, or some of them.

In August, 1866, this suit was instituted: and the bill prayed for a declaration that the Plaintiffs and other freehold tenants of the lords of the said manor were entitled to the various common rights already mentioned; and for an injunction to restrain the Defendant college, their servants, agents, and workmen, from inclosing, or suffering to remain or be inclosed, any part of the three commons; and from letting, or agreeing to let, any part of any of the commons as a practice-ground for the exercise of artillery, cavalry, and infantry; and from in any manner disturbing or interfering with any of the said rights of the Plaintiffs and the other freehold tenants of the lords of the said manor on and over the three commons, or any or one of them; or interrupting their free ingress to and egress from the same, or any or one of them; and in particular from erecting, or commencing to erect, and from entering into any agreement as to the erection of, any houses, buildings, or fences upon any part of any one of the three commons, and from allowing any roads or paths recently stopped up to remain so stopped up.

The Defendant, the Rev. *William Jackson*, was the provost of *Queen's College* for the time being, and was made a party for the purposes of discovery only.

The cause now came on to be heard. In support of their case the Plaintiffs mainly relied on various entries in the Court Rolls from 1685 down to a recent period. Of these entries the following may serve as samples:—At a view of frankpledge held on the 24th of October, 1689, the jury presented that no one ought to cut turf on the common of *Plumstead*, except only those who reside in the parish, and that they should use and burn the same only in houses described in the Court Rolls as "*domos suas mansionales*;" and that if any fine or amercement should be imposed upon offenders, one moiety should be for the poor of *Plumstead*, and the other for the lord of the manor. At a view of frankpledge and Court Baron held on the 19th of October, 1704, the jury presented that all persons of the parish of *Plumstead* who should keep cattle upon the common of the manor after the 1st of May then next should be amerced for each head of cattle 2*s*. 6*d*.; and they

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also presented that *Thomas Newington*, not being a parishioner of *Plumstead*, had cut a great quantity of turf and heath, and he was, therefore, amerced 40*s.*; and they further presented that all persons who were not parishioners of the parish of *Plumstead*, and had cut turf or heath on the common of the manor, should pay to the lord of the manor 20*s.* for every hundred turves, and 20*s.* for every hundred of heath. At a Court Leet and Court Baron (1), held on the 27th of October, 1712, it was presented that all persons who should cut "*cespites virides*" (*anglice*, place turf) upon the common of the manor should pay to the lord of the manor 10*s.* for every hundred; and that all persons, "*inquilinas*" (*anglice*, inmates) of *Plumstead*, who should cut turf and heath upon the common of the manor, should pay to the lord of the manor 10*s.* for every hundred; and that every person who should cut heath upon the common of the manor, for the use of their kilns within the manor, beyond 200 in the year, should pay to the lord 10*s.* for every hundred thereof, and that they should pay to the lord 20*s.* for every thousand of turf beyond 2000 cut for the purpose aforesaid.

The Plaintiffs also relied on the fact that in 1818 a lease of part of *Plumstead Common* had been granted by the college to *Andrew Strahan* and *Butler Adams* for a term of twenty-one years, and that previously to the granting of this lease a meeting of freeholders of the manor was held on the 25th of March, 1817, at which the proposed lease was sanctioned, upon the terms that the annual rent should be 20*s.*; one moiety of which was to be payable to the lords of the manor, and the other moiety to the overseers and churchwardens of the poor of the parish of *Plumstead*, to be laid out by them in the purchase of bread for the poor of the parish. On the lease actually executed was indorsed a memorandum signed by seven freeholders of the manor, who thereby signified their approval and allowance of the lease.

The Plaintiffs also adduced parol evidence, shewing that they and other persons claiming to be freeholders of the manor had in recent times turned out their cattle on the commons, and cut furze and turf there.

(1) In the Rolls, the entries relating to Courts Baron and Courts Leet were in many cases so mixed up that it was difficult to ascertain to which Court some of the entries related.

The Defendants by their answer stated that some parts of *Plumstead Common* had been inclosed between 1834 and 1855, and the rest at various times between the latter year and 1866. In 1834 a board was placed by the college on *Shoulder-of-Mutton Green* warning all persons against cutting turf or digging for gravel thereon without leave from the college; and in 1859 similar boards were placed on *Plumstead Common* and *Bostal Heath*. In 1860 letters in the following terms were sent by the solicitors of the college to all persons whose cattle were found on the commons:—

"*London*, 10, *Whitehall Place*,
"13th August, 1860.
"*Plumstead*.

"We beg to call your attention to the fact of the Provost and Scholars of *Queen's College, Oxford*, being lords of the manor of *Plumstead*, and the owners of considerable property in the parish, including *Plumstead* and *Bostal Commons*, and to ask you by what authority you depasture upon *Common*. (The blanks were for the description of cattle and the name of the common.)

"We are advised that you have no such right, and understand that you have not received any authority from the lords or their former agents; therefore we request an immediate reply to this letter.

"Some arrangement might be made for turning your cattle on the common on payment of a yearly sum to the college; and unless that be done, we shall have no alternative but to bring an action against you, or to impound your cattle.

"If you wish to make an arrangement with the college, you must call upon Mr. *Samuel Cook*, the common-keeper, with such explanation as you can give; or we shall be ready to confer with you, or any one on your behalf, if you think it advisable to come here for the purpose.

"We are, Sir,
"Your obedient servants,
"*White, Borrett, & White.*
"Solicitors to the College."

The Defendants alleged that the effect of these notices was that,

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with one exception, all persons either removed their cattle from the commons, or made terms with the college for continuing them there. The excepted individual was a person named *Winn*, who set up a title by prescription in respect of an ancient house, and the Defendants did not consider it worth while to incur the expense of a litigation with him. In 1860 and 1861 proceedings were taken by the college against various persons for cutting turf and removing gravel; and the Defendants alleged that such proceedings practically put a stop to the cutting of turf, furze, and heath, and the removal of gravel.

The Plaintiffs, however, were able to shew that various persons claiming to be, or to hold under, freeholders, and in particular the Plaintiff *Joseph Jacobs*, did not acquiesce in the claims of the college, and continued to exercise various of the rights claimed by the bill.

Sir *Roundell Palmer*, Q.C., Mr. *Joshua Williams*, Q.C., and Mr. *W. R. Fisher*, for the Plaintiffs:—

The case of *Smith* v. *Earl Brownlow* (1) shews that the suit is properly framed; and we contend that the evidence which we have adduced is sufficient to support our claim.

It will probably be contended, on the other side, that the Court Rolls, on which we rely much, shew that the rights of common claimed by the bill belong not to the freeholders of the manor, but to the parishioners of *Plumstead*, and that a claim to a right of common by parishioners cannot be maintained: *Gateward's Case* (2).

It is admitted that the manor and parish are not now coextensive; but it appears, from documents proved in the cause, that the manor of *Plumstead* comprised originally the whole of the parishes of *Plumstead* and *East Wickham*, and that there were divers submanors held of it. The lords of the manor of *Plumstead* were formerly the monastery of *St. Augustine, Canterbury;* and on the dissolution of the monasteries, *Henry* VIII. granted out the submanors to be held of him *in capite;* and the tenants of these submanors had, or at least might have had, rights of common over the wastes of the manor of which they were formerly held; and so the persons entitled to rights of common would be the freeholders of lands within the parish, and their tenants, all of whom would be rated to the poor,

(1) Law Rep. 9 Eq. 241. (2) 6 Rep. 59, b.

and might be properly described as parishioners. The word "parishioner" is a word of flexible meaning, and to be construed according to the subject-matter to which it is applied: *Rex* v. *Mashiter* (1); *Rex* v. *Davie* (2); *Attorney-General* v. *Forster* (3). That the meaning which we attach to it in the Court Rolls is the true one is shewn by the proceedings with respect to the lease granted in 1818; for there the consent of the freeholders was asked and obtained, although part of the rent reserved was to be applied for the benefit of the parish. These proceedings are also important in this respect, that they rebut the defence set up by the college, who say that no one has any right to the commons besides themselves.

It will be borne in mind that we do not seek to establish prescriptive rights, but we claim to exercise customary rights whose origin is coeval with that of the manor; and it is for the Defendants to shew that these rights have been abandoned. Mere lapse of time without exercise of the right of common of pasture is not enough. The freeholders may have abstained from exercising their rights for some very good reason—as, for example, that there was no pasture on the common.

The origin of common appendant is explained in the following authorities: *Comyn's* Digest, title "Common," B; *Mellor* v. *Spateman* (4); *Bennett* v. *Reeve* (5). It may be said that the lands held by the Plaintiffs are not arable lands, and consequently not such as that a right of common could attach to them; but where common of pasture has in fact been enjoyed, it will be presumed that the land in respect of which it has been enjoyed was originally arable land: *Tyrringham's Case* (6); *Carr* v. *Lambert* (7).

As to the rights of walking and recreation. A right of roaming over a piece of land, or "*servitus spatiandi*," is known to the law, and is maintainable: *Duncan* v. *Louch* (8); *Dyce* v. *Hay* (9). A right of playing lawful sports and games is also maintainable: *Abbot* v. *Weekly* (10); *Fitch* v. *Rawling* (11); *Mounsey* v. *Ismay* (12).

(1) 6 A. & E. 153.
(2) Ibid. 374.
(3) 10 Ves. 335.
(4) 1 Wms. Saund. 343.
(5) Willes, 227.
(6) 4 Rep. 36 a.
(7) Law Rep. 1 Ex. 168.
(8) 6 Q. B. 904.
(9) 1 Macq. 305.
(10) 1 Lev. 176.
(11) 2 H. Bl. 393.
(12) 1 H. & C. 729.

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These authorities shew that the right may be claimed by the inhabitants of a town, or the freemen and citizens of a borough; and if so, why not by the tenants of a manor?

Mr. *Mellish*, Q.C., Mr. *Jessel*, Q.C., Mr. *Lindley*, and Mr. *Eaton*, for the Defendants:—

The bill is founded on a mistaken view of the law. It is assumed that if a man possesses two acres of freehold land within the manor of *Plumstead* he is entitled to all the rights of common claimed by the bill. But that is not so. Each tenant has such a right of common as was granted to him, and no other. For example, no one can be entitled to common appendant unless he has had arable land granted to him: *Tyrringham's Case* (1). There is no evidence that any one of the Plaintiffs, or their predecessors in title, has had a grant of any such land. We admit that if a right of common had been exercised in connection with particular lands for a great number of years, there would be a presumption that such lands were ancient arable lands in connection with which a right of common appendant had been granted; but there is no such evidence in this case. The Plaintiffs, indeed, say that they have exercised rights of common; but they do not shew that they have done so as owners of any particular lands.

Again, no one can have common of turbary except the owner of a house built before the time of *Richard* I., or a house substituted for another house built before that time: *Luttrel's Case* (2); *Dunstan* v. *Tresider* (3) [They referred to the authorities cited by Sir *W. Follett*, in *Arlett* v. *Ellis* (4), whose argument on this head they adopted.] Not one of the Plaintiffs proves that he is entitled to such a house.

We say then, that a declaration cannot be made that all the tenants of this manor are entitled to rights of common of pasture, turbary, and estovers. The only declaration which could possibly be made would be to the effect, that such of the freehold tenants as possess ancient arable land are entitled to common of pasture; that such of the freehold tenants as possess ancient messuages are entitled to common of turbary, &c.; but we submit that no such

(1) 4 Rep. 36 a.
(2) Ibid. 86 a.
(3) 5 T. R. 2.
(4) 9 B. & C. 671.

declaration can be made in a suit framed, as this is, on behalf of all the freehold tenants.

As to the rights of recreation claimed by the bill, these, where they exist, are personal rights; they may belong, for example, to the inhabitants of a village or district, and may be claimed accordingly. But the claim made by the bill is not on behalf of the Plaintiffs as inhabitants of *Plumstead*, but as freeholders of the manor, having rights of recreation appurtenant to their tenements held thereof; and it is impossible to adduce any authority whatever to shew that a person *quà* freehold tenant has ever been held entitled to any such right. It has been said at the Bar that the Plaintiffs claim these rights not *quà* freeholders, but simply as having them; they cannot, however, change the case they have set up.

Further, we say that a suit cannot be maintained by a freehold tenant entitled to a right of common on behalf of himself and all other tenants entitled to such a right. Such a suit can only be maintained where there is the same right in all the persons claiming it. In the case of copyholders, for example, we admit that such a suit can be maintained; and thus the decision in *Smith* v. *Earl Brownlow* (1) may be supported, the Plaintiff there having been a copyholder as well as a freeholder, and having filed his bill on behalf of copyholders and freeholders. The only instance of a similar bill on behalf of freeholders only is *Powell* v. *Earl of Powis* (2), which was decided on demurrer, the bill containing an averment that the rights of all the tenants were the same as those of the Plaintiff. The tenants in that suit may have been customary freeholders, who are simply copyholders. A right of common cannot be claimed by the freeholders of the manor by virtue of a custom, although the law is otherwise with respect to copyholders. The reason is, that a *profit à prendre* cannot be taken on another man's land by custom, although it may by prescription: *Grimstead* v. *Marlowe* (3); *Constable* v. *Nicholson* (4); *Attorney-General* v. *Mathias* (5); *Willingale* v. *Maitland* (6). Now, a title by prescription is proved by the exercise of a right by a particular individual

(1) Law Rep. 9 Eq. 241.
(2) 1 Y. & J. 159.
(3) 4 T. R. 717.
(4) 14 C. B. (N.S.) 230.
(5) 4 K. & J. 579.
(6) Law Rep. 3 Eq. 103.

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and his predecessors; and evidence given in support of such a title in a particular freeholder is no evidence on behalf of any other freeholder, unless there be either a presumption of law that the rights of all freeholders are the same, or it be proved as a matter of fact that they are so. There is no such presumption of law: *Gateward's Case* (1); *Earl of Dunraven* v. *Llewellyn* (2). Nor is there any evidence adduced to shew that the rights of all the freeholders in this manor are in point of fact identical.

It has been decided in various cases, such as *Mayor of York* v. *Pilkington* (3), that a person claiming a single right against a number of persons, who resist that right under various titles, may file a bill making them all Defendants; but it has never been held that several co-Plaintiffs, with different titles, could join to establish a right against a single Defendant. For example, it was never held that the owners of three farms could join as co-Plaintiffs in establishing moduses, on behalf of their three farms, against the owner of the tithes. Bills on behalf of a class are only allowed in cases of necessity, where a denial of justice would otherwise be the result; but where a single Plaintiff can file a bill, there is no need to resort to such a decree. The right to file a representative bill may be tested in this way: if this bill were dismissed, would any freeholders be bound except the Plaintiffs? Would it not be open to any other freeholder to file another bill to establish the same rights? We say that it would—that you cannot bind an absent man by filing a bill on his behalf.

The claim to take gravel and loam is clearly bad. A custom of this sort ought to have some limits, otherwise the freehold might be destroyed: *Lady Wilson* v. *Willes* (4); *Clayton* v. *Corby* (5). Here the claim is not even confined to taking gravel and loam for agricultural purposes.

The Plaintiffs have not proved a title by prescription by giving evidence of immemorial user, nor have they done so under the *Prescription Act;* for in order to establish a title under that Act, there must be evidence of enjoyment without interruption for thirty years next before the commencement of the suit: 2 & 3

(1) 6 Rep. 59 b.
(2) 15 Q. B. 791.
(3) 1 Atk. 282.
(4) 7 East, 121.
(5) 5 Q. B. 415.

Will. 4, c. 71, ss. 1, 4. Now here the suit commenced in 1866; but we shew that ever since 1859 all persons have been stopped in the exercise of the rights claimed.

Again, we say that the Plaintiffs have not shewn themselves to be entitled to any land in respect of which they can have the rights they claim. All that is shewn is, that one Plaintiff is entitled to an ancient orchard, in respect of which there can be no right of common of pasture; and that another is entitled to a piece of land which is completely built upon, and consequently in respect of which any right of common which ever existed must be taken to be abandoned, or at all events suspended: *Carr* v. *Lambert* (1); *Reg.* v. *Chorley* (2); *Crossley* v. *Lightowler* (3).

Besides all this, we deny that the evidence proves the existence of any rights in the freeholders. Any rights which are shewn to exist belong to the inhabitants or parishioners of *Plumstead*, not to the tenants of the manor. The right of recreation, for example, is proved to exist just as much as the right of cutting turf: the former right must belong to the inhabitants, not to the freeholders; and why may not the same remark apply to the latter? It is assumed, on the other side, that the manor of *Plumstead* originally comprised the whole parish; and that when a submanor was granted out, the tenants of the submanor retained their former rights of common; that would depend on the grant, and the fact cannot be assumed without evidence.

Sir *Roundell Palmer*, in reply:—

It is denied that freehold tenants of a manor have such a community of interest as to enable them to maintain this suit, though it is admitted that copyholders have such a community of interest. The same point was raised in *Smith* v. *Earl Brownlow* (4), and must be taken to have been decided adversely to the Defendant; for by the decree a declaration was made, in the terms of the prayer of the bill, to the effect that the Plaintiffs were entitled to rights appendant or appurtenant to their freehold and copyhold tenements; and if it had been held that *quà* freeholder the Plaintiff could not maintain his suit, such a declaration would have been improper.

(1) Law Rep. 1 Ex. 163.
(2) 12 Q. B. 515.
(3) Law Rep. 3 Eq. 279.
(4) Ibid. 9 Eq. 241.

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It is said that a freehold tenant must claim his rights either under grant or by prescription, not by custom; and that so doing, every tenant must sue separately in respect of any infringement of his rights. I admit that, as explained in *Co. Litt.* (1), there is a well-founded difference between custom and prescription; but the consequences which flow from that difference are, in a Court of Equity at all events, much smaller than has been supposed.

In the first place, it is clear that in establishing title by prescription, custom is an important ingredient. Thus in *Comyn's* Digest, tit. "Prescription," it is laid down that prescription rests on two things, time and usage: usage is the Latin word *usus*, which is equivalent to *consuetudo*, i.e. custom. In 12 Car. 2, c. 24, s. 1, it is enacted that all tenures shall be turned into common socage, any law, statute, custom, or usage to the contrary notwithstanding—a passage which shews the close connection between custom and usage, and also shews that customs may govern the incidents of freehold tenures; for the statute deals only with freeholds, the law relating to copyholds remaining unaltered.

The nature of a right of common is explained in *Co. Litt.* (2), and the definition of it does not imply several grants to many persons, but a single grant in which many participate. *Coke's* first division of common of pasture is common appendant, of which he says that it is of common right, and therefore a man need not prescribe for it. There is no doubt a difference in the mode in which a freeholder and a copyholder claim a right of common; the former prescribes for it in his own name, the latter in the name of the lord. The reason is, that a copyholder has not such an estate as to support a title by prescription: *Hoskins* v. *Robins* (3). But although each freeholder prescribes in his own name, and each copyholder in the name of his lord, it by no means follows that there is no community of interest among freeholders, or that freeholders are not affected by the customs of a manor, as the Defendants contend. *Perryman's Case* (4) and *Griesley's Case* (5) shew that the custom of a manor extends to freeholders; and many other cases are cited in *Scriven* on Copyholds (6); *Nelson's Lex Mane-*

(1) Page 113 b.
(2) Page 122.
(3) 2 Wms. Saund. 319 f.
(4) 5 Rep. 83 b.
(5) 8 Rep. 38 a.
(6) 3rd Ed. vol. ii. pp. 742, 747.

riorum (1). In *Damerell* v. *Protheroe* (2), the lord claimed a heriot by custom, and proved his title by presentments on the Court Rolls.

[The MASTER OF THE ROLLS:—How do you reconcile that case with *Earl of Dunraven* v. *Llewellyn?* (3)].

Sir *Roundell Palmer:*—In that case the question was whether a particular spot of land formed part of the waste of a manor, or belonged to an entire stranger. Evidence was offered that tenants of the manor had said that the spot formed part of the waste; but such statements were clearly of no greater weight than if they had been made by the lord of the manor himself; and it is quite clear that no amount of statement by him could establish his own title against a third party; but it is a very different thing where, as in *Damerell* v. *Protheroe,* and in the present case, the question is between the lord of the manor and his tenants.

It is desirable to bear in mind the issue raised by this suit. The Plaintiff comes forward, not claiming a right in himself, and taking no notice of any one else, but saying that he and all the tenants of the manor have certain rights. The Defendants reply by saying that no one has any right whatever. The evidence they offer does not go to shew that different classes of tenants had different rights; in fact, it would be hopeless to look for any evidence of the kind, for all these tenancies were created before the Statute of *Quia Emptores,* at a time when the freeholders by themselves formed a class of tenants of the manor; and it was not the practice to carve out particular tenures. But though no such evidence is offered, it is argued that common of pasture is incident only to arable land within the manor, and not to orchards or houses. But in ancient times only arable lands were granted out for purposes of cultivation; and, as incident to such a grant, the law presumed a grant of a right of common. Every tenant was bound to plough and manure his own land; and he was presumed to require land to feed the cattle he employed for such purposes. It has never been supposed that in order to establish a right to common you must shew that your predecessors in title ploughed some land

(1) Page 54 *et seq.* (2) 10 Q. B. 20.
(3) 15 Q. B. 791.

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previously to the Statute of *Quia Emptores;* on the contrary, all the cases shew that every presumption will be made which is consistent with the actual enjoyment of the land in respect of which the common is claimed, and that though the condition of the land be altered the right of common remains: *Tyrringham's Case* (1); *Emerton* v. *Selby* (2); *Carr* v. *Lambert* (3). The case of *Dunstan* v. *Tresider* (4) was decided on a point of pleading.

But even at law freeholders have in certain cases been allowed as a body to claim right of common. Thus, in *Potter* v. *North* (5), it was pleaded, in bar to an action, that freeholders and copyholders had a right of common, and the plea was held good. Again, it appears from *Fitzherbert's Natura Brevium* (6), tenants of ancient demesne were entitled to sue out a writ of *monstraverunt*, the proceedings under which were in the nature of a suit by a member of a class as a representative of the whole class; and though such a privilege is at law confined to tenants of ancient demesne, a Court of Equity will find no difficulty in applying the principle to cases of a like nature. It also appears from the same book (7), that the lord of a manor might sue out a writ *de consuetudinibus et servitiis;* and the form of this writ was a command by the King, that *A. B.* do to *C. D.* the customs and services which he ought to do for his freehold, which he holds of *C. D.* in *G.* That proves that the freeholders of a manor are bound by its customs; and though the tenants do not appear to have had the privilege of suing out a like writ against the lord of the manor, that is a defect in legal procedure which a Court of Equity will have no difficulty in supplying. It is to be observed that *Fitzherbert* expressly says that the lord may sue several tenants by the same writ.

The cases in Equity were all cited by me in the argument in *Smith* v. *Earl Brownlow* (8), and on this occasion I shall content myself with citing only a few of them. *Tothill*, under the title "Common" (9), mentions a case of *Tenants of Dosthorp* v. *Loveday*, in which he says "a point of common" was determined. *Mayor of York* v. *Pilkington* (10) was a suit against Defendants having no

(1) 4 Rep. 36 a.
(2) 6 Mod. 115.
(3) Law Rep. 1 Ex. 168.
(4) 5 T. R. 2.
(5) 1 Wms. Saund. 346, 349.
(6) Vol. i. p. 14.
(7) Vol. ii. p. 151.
(8) Law Rep. 9 Eq. 241.
(9) Page 98.
(10) 1 Atk. 282.

community of interest; and Lord *Hardwicke* says: "A bill may be brought against tenants by a lord of a manor for encroachments, or by tenants against a lord of a manor as a disturber, to be quieted in the enjoyment of their common; and as in these cases there is one general right to be established against all, it is a proper bill, nor is it necessary all the commoners should be parties." There is no reason for saying that by "tenants" in this passage are meant copyhold tenants only. Again, the same Judge says, in *Lord Tenham* v. *Herbert* (1): "It is certain, where a man sets up a general exclusive right and where the persons who controvert it with him are very numerous, and he cannot, by one or two actions at law, quiet that right, he may come into this Court first, which is called a 'bill of peace,' and the Court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another." These passages are sufficient authority for the institution of this suit; for here the Defendants are setting up an exclusive right to this common, and are urging, by way of defence, that there ought, in equity as well as at law, to be separate proceedings by each tenant to establish his right, contrary to the express judgment of Lord *Hardwicke*. Besides, *Powell* v. *Earl of Powis* (2) is identical with this case. But even if it be not, why should the three old cases be overruled? Are they not entirely consistent with the principles of the Court, which constantly intervenes to extend justice to large numbers of persons in cases where the machinery of law is defective? What authority is there against it? The only one cited is *Earl of Dunraven* v. *Llewellyn* (3). That was not the case of a bill of peace, nor was the question there between the lord of a manor and his tenants; but it was between the lord and a stranger, the lord trying to establish his right by means of the declaration of parties in the same interest as himself; and all that was decided was, that the matter in dispute was not such a matter of public reputation as to allow such declarations to be admitted in evidence. That is no authority that the tenants of a manor cannot maintain a bill of peace against the lord. *Gateward's Case* (4), *Grimstead* v. *Marlowe* (5), and other cases

(1) 2 Atk. 483, 484.
(2) 1 Y. & J. 159.
(3) 15 Q. B. 791.
(4) 6 Rep. 59 b.
(5) 4 T. R. 717.

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were cited by the other side; but they only go to shew that you cannot claim a right of common except as incident to an estate; thus it will not do to claim such a right for the inhabitants of a particular place. But this suit is not open to such an objection. Then it is said that the entries in the Court Rolls speak of the parishioners and inhabitants of *Plumstead* as being the persons entitled to the rights we claim. But, with reference to that, it is to be observed that when you find the expressions "parishioners" and "inhabitants," it is always in a negative connection, to define those who have not the right, and not those who have it. Thus, a person not a parishioner is fined for exercising the right, and the fact of his not being a parishioner is conclusive against him; but it is not to be inferred that all parishioners were considered as entitled to such rights. If this be borne in mind, it will be found that the Court Rolls establish one title to all the rights we seek to establish, except that of recreation, with which I do not now deal.

April 25. LORD ROMILLY, M.R.:—

This is a suit instituted by four gentlemen, on behalf of themselves and all other the tenants of the manor of *Plumstead*, in *Kent*, against the Provost and Scholars of *Queen's College, Oxford*, praying that they may be restrained from approving, that is, inclosing, the common of *Plumstead*, and also the green called *Shoulder-of-Mutton Green*.

The evidence of the user of the common for pasture of commonable beasts, and of cutting furze and turf, is continuous in the Court Rolls from a very early period; nor does it appear to me to have ever been contested by the college until the appointment of Mr. *John Meadows White* as their steward in 1859, when he took steps to claim the whole waste for the college. These measures as against several persons were successful, but were resisted by others. This proceeding it is which has led to this suit. Respecting this it will be necessary for me to recur presently; but in the first instance I must notice a matter which—partly as a matter of substance, but principally one of form—has been very strenuously, and indeed principally, argued before me, and most

relied upon as an objection to the foundation of this suit. It is this: It is contended that a suit cannot be instituted by some freehold tenants of a manor on behalf of themselves and all the other freehold tenants of the manor respecting any manorial rights or customs. This, though apparently merely a technical objection, is one of great importance, both as regards this case and others of a similar character, and one which I have found it necessary to investigate, and to consider to the best of my ability.

It is necessary to premise that the peculiarity of this manor is that there are no copyhold tenants of the manor. Of course, though a manor cannot exist without freehold tenants, that is, without a homage, it may exist without having any copyhold tenants. This is the way in which I understand the objection to be put. The rights of copyhold tenants of a manor depend upon custom which applies to all; and as the right is one of a base tenure, it may be established by evidence of custom, because custom applies to all persons in that position. But freehold tenants are in a totally different situation: their rights are of socage tenure, and they claim, not by custom, but by a grant which existed before the time of legal memory; that, consequently, there can be no common appendant to a freehold tenement, unless the grant of the freehold tenements included arable land: for it is admitted that, by Common Law, there is no common of pasture appendant to a meadow or to a house, or to anything but arable lands; and that although a grant might be made of common of pasture to the owner of a house or of a meadow, it would then be personal, and would be common appurtenant, to be proved by the production of the grant, or to be inferred from long-continued user of the right by the owner of the house; and that it follows from thence that this distinction arises between the establishment of the rights of copyhold tenants and the rights of freehold tenants of a manor, namely, that the evidence for one copyhold tenant of a manor is evidence for all; but that in the case of a freehold tenant, the evidence which establishes his right to common of pasture, or the like, establishes nothing in favour of another, and that in each case of a freehold tenant, you must prove that the tenant had arable lands if you attempt to establish a right to common appendant; or you must establish that the grant gave him a right of common of pasture in express words, if

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you seek to establish a right of common appurtenant to his freehold; and consequently, that although in the case of copyhold tenants you can prove the custom by evidence of one, in the case of freehold tenants of a manor each one must prove his own case as a distinct and separate matter requiring distinct and separate evidence; and that, consequently, one or two freehold tenants of a manor cannot sue for the rest, for that their interests and rights cannot be identical. In the case of copyhold tenants, the proof of a single undisputed instance will establish the custom; but in the case of freehold tenants, if, out of a hundred freehold tenants of a manor, you prove the right in ninety-nine, this will not be available in the slightest degree to establish the right of the hundredth. In doing this, they draw and insist upon the distinction between custom, on the one hand, which is always local, and prescription, on the other hand, which is always personal. Such I understand to be a short outline of the argument which has been very ably presented to me.

In considering this matter, it appears to me to be natural to consider how the question of custom has arisen in the case of copyhold tenants. It is true that copyholds were of base tenure, and freeholds of socage tenure; but, except for this difference, there was, as I believe, no distinction at all between the origin of the copyhold tenant and that of the freehold tenant of a manor. In both cases, their rights sprang originally from a grant made by the lord; and the reason why the copyhold tenant relies upon the custom is this: because, as the lord has the freehold, and as the copyhold tenant cannot prescribe against the lord who has the freehold, he is compelled to rely upon the custom, which is proved by usage, although no evidence is to be found of the original grant. Nor do I believe that any one who has investigated the old charters thinks that the copyhold tenants were all created at the same time, or that they were not added to and merged, as the case might be, from time to time; or that, indeed, the grants were always in writing. Wherever, as between the freehold tenants and the lord, there is a privity relating to the manor itself—for the freeholders constitute the homage, and without two at least the manor cannot exist—and no base tenure interferes with the rights of the freehold tenant, the distinction between

custom and prescription within the limits of the manor is a very thin one (especially at this time, when all serfdom and baseness of tenure has practically been destroyed), and one which ought not to be enlarged for the purpose of increasing the impediments to the determination of the rights between the lord of a manor and his homage. In fact, they both spring from grants the nature of which is to be inferred from usage.

The case which is mainly relied upon by the Defendants, in support of this objection, is the case of *Earl of Dunraven* v. *Llewellyn* (1). The material portion of the judgment is as follows:—

"This right, therefore, is not a common right of all tenants, but belongs only to each grantee, before the Statute of *Quia Emptores*, of arable land by virtue of his individual grant, and as an incident thereto; and it is as much a peculiar right of the grantee as one derived by express grant, or by prescription, though it differs in its extent, being limited to such cattle as are kept for ploughing and manuring the arable land granted, and as are of a description fit for that purpose; whereas the right by grant or prescription has no such limits, and depends on the will of the grantor. We are therefore of opinion, that this case is precisely in the same situation as if evidence had been offered that there were many persons, tenants of the manor, who had separate prescriptive rights over the lord's wastes: and reputation is not admissible in the case of such separate rights, each being private, and depending on each separate prescription, unless the proposition can he supported, that because there are many such rights, the rights have a public character, and the evidence therefore becomes admissible."

I do not mean to discuss the propriety of the proposition in the first paragraph which I have just read, which is not, as it appears to me, necessary for the conclusion to which their Lordships came in that case, and which has been contested with great learning and ability by Mr. *Joshua Williams*, in an appendix to the eighth edition of his work on Real Property. But still it may be proper to observe, that if the rights of freehold tenants against the lord's waste be not a matter of custom, or of common right, it is difficult to understand how, on the other hand, the lord's right

(1) 15 Q. B. 791, 810, 811.

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against the freehold tenants should be a customary right; and yet it has been decided that the lord's right to seize heriots on the death of a freehold tenant is a customary right. According to the opinions of most learned persons, this right was supposed to be reserved by the lord at the time when he made his grant to the freehold tenant, and it was one which might, or might not, have been reserved at that time, just as the right of common of pasture might, or might not, have been granted; and yet in *Damerell* v. *Protheroe* (1), it was expressly established that a heriot may be due by custom in respect of lands held in fee simple of a manor. In saying this, I do not mean to contest the accuracy of the proposition so stated in *Earl of Dunraven* v. *Llewellyn* (2); nor is it necessary that I should do so, as I am of opinion that it does not establish the proposition for which the Defendants contend in this case, which, if carried to the full extent of their argument, amounts to this—that, except in cases of custom, no two or three persons can ever sue on behalf of themselves and all other persons situated in a similar position to themselves.

I wish to consider the case in this view: Assume that it was proved, by the production of the grants themselves, that similar grants of common of pasture had been made to a hundred freehold tenants of a manor, and that the lord had long afterwards interfered with their rights, and stopped the user of them. In that case I am of opinion that two or three of the tenants might sue on behalf of themselves and all others for the preservation and enforcement of their rights. Nor does it appear to me that there would be any inconsistency in their so suing, if the rights to be enforced were the same, and if they only varied in degree—as, for example, in the number of beasts to be depastured. Nor does it appear to me that there would be any bar to their so doing if, for instance, the right of common was common appendant in respect of a grant of arable land, or common appurtenant in respect of a special particular grant of that particular right of common specified in the grant itself. If this be true in the case of the grants themselves being produced and proved, then I am of opinion that if from immemorial usage this right of common is shewn, the Court will presume the existence of the grant sufficient to support the user,

(1) 10 Q. B. 20. (2) 15 Q. B. 791, 810.

although it be not produced. In one case Lord *Abinger* said that, if necessary, he would presume the existence of an Act of Parliament to support the usage established, but without drawing any such distinction as that it could not be inferred if the usage required its origin to spring from a series of separate freehold grants.

When I look at the cases decided in Equity upon this subject, they seem to me all to support this view of the case. I had to consider this point, although it was not so elaborately argued, in the case of *Smith* v. *Earl Brownlow* (1); and I came to the same conclusion as I still do, that the case of the *Mayor of York* v. *Pilkington* (2), which I referred to, establishes this case. In that case the claim was to a right of fishery; there had been possession of the fishery for a considerable time, and this was a bill to quiet the right. Lord *Hardwicke* says (3):—

"In this respect it does differ from cases that have been cited of lords and tenants, parsons and parishioners, where there is one general right, and a privity between the parties. But there are cases where bills of peace have been brought though there has been a general right claimed by the Plaintiff, and yet no privity between the Plaintiffs and Defendants, nor any general right on the part of the Defendants, and where many more might be concerned than those brought before the Court. Such are bills for duties, as in the case of the *City of London* v. *Perkins* (4), in the House of Lords, where the City of *London* brought only a few persons before the Court, who dealt in those things whereof the duty was claimed, to establish a right to it, and yet all the King's subjects may be concerned in this right; but because a great number of actions may be brought, the Court suffers such bills, though the Defendants might make distinct defences, and though there was no privity between them and the City. I think, therefore, this bill is proper, and the more so because it appears there are no other persons but the Defendants who set up any claim against the Plaintiffs, and it is no objection that they have separate defences; but the question is, whether the Plaintiffs have a general right to the sole fishery, which extends to all the Defendants?—for, notwithstanding the general right as

(1) Law Rep. 9 Eq. 241.
(2) 1 Atk. 282.
(3) 1 Atk. 284.
(4) 3 Bro. P. C. 602.

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tried and established, the Defendants may take advantage of their several exemptions or distinct rights."

Suppose the case of *Plumstead Common* to be that the lords of the manor had never allowed any tenant, freehold or copyhold, to depasture beasts on the said piece of land called *Plumstead Common*, and that suddenly all the tenants of the manor claimed a right to do so, and send their cattle on the common—must the lord bring separate and distinct proceedings against each one of the tenants? Does not this case of the *Mayor of York* v. *Pilkington* (1) establish that the lord may file a bill against them all, or against some to represent the rest?—and if so, is there to be no reciprocity in such cases? May the lord comprise them all in one suit, and yet must they each file a separate bill against him to establish their rights? There is, in fact (as Lord *Hardwicke* says), a privity between them; and this is especially so as between the lord and the freehold tenants of the manor who form the homage, and whose duty it is periodically from time to time to hold Courts Baron, and preserve the rights and privileges of the lord and the tenants from injury and destruction, either by themselves or by strangers. This being so, I am of opinion that one freehold tenant may sue on behalf of himself and others, provided he shews that they have exercised such rights for what this Court considers to be time immemorial. In this case it is admitted that one at least of the Plaintiffs is a freehold tenant of the manor, and that in my opinion is enough, although I think, upon the evidence, it is proved that three of the Plaintiffs are freehold tenants of the manor. They might be sued as defending a class by the lord, and, in my opinion, they may as a class sue the lord.

The next question is one of great importance for the determination of this case. It is one of fact. Is the use of the commonable rights established by the evidence? For this purpose it has been necessary to prove, and also to go through, the Court Rolls of the manor. I look at the evidence of the Court Rolls, and I find that from the year 1688 down to the time when the disputes began in 1860, abundant evidence is found in the rolls of the manor recognising freehold tenants of the manor of *Plumstead*, and recognising their depasturing of beasts and their cutting of furze and turf. The

(1) 1 Atk. 282.

assent of the freeholders is given to the erection of a cottage upon the waste. A list of the freehold tenants is made out on several occasions, with the quitrents which they had to pay, and the like; all of which would be sufficient in my opinion if it stood alone, without more, to establish the right of the freehold tenants. It does not however stand alone, and what is coupled with it is injurious to it. It is to some extent vitiated by what is found in the rolls themselves, for the rolls of the manor are embarrassed with many entries which belong properly only to Courts Leet, and with the interposition of the parishioners of *Plumstead*, whose assent or dissent to various matters is recorded in these rolls, but which, so far as regards the rights of the tenants of the manor, is wholly immaterial. But these are not sufficient to invalidate what appear to me to be the continued and uncontested rights of the freehold tenants. I do not think it necessary to go through them in detail. There is no evidence or suggestion of any interruption before the year 1860. They are supported and confirmed by the parol evidence, which, as far as it extends, is very distinct. I think that if the claims of the Plaintiffs were to be treated as a prescriptive right, the evidence in the Court Rolls of the practice of depasturing the waste, and also of cutting furze and turf, is frequent from the earliest time, and that this evidence exists fully down to the end of the year 1784, and is sufficient for the Plaintiffs; and although less numerous instances are to be found since that time, yet they are still sufficient to support the claim, which, as I have said, I never find to have been contested until the year 1860.

I reject, as I have stated in the observations I have already made respecting the frame of the suit, the argument that there lies upon the Plaintiffs the necessity of shewing that the original grant gave them the right of depasturing upon the waste, or the right of cutting fire-bote or turf. When I find long-continued user, I presume the grant. It may perhaps be reasonably objected, that a man cannot claim the same right by custom and by prescription; but I think, that when the user has been long-continued and uninterrupted, the Court will presume the grant, and that the burthen of proof lies upon the lord who seeks to disturb the long-practised user. I think the rights of the Plaintiffs may be supported without

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reference to the *Prescription Act* (2 & 3 Will. 4, c. 71); but I am unable to find any reason why the *Prescription Act* should not apply. The argument for the Defendants is that the rights have been interrupted during the last six years, but I am unable upon the evidence to find any such interruption. According to the statute, the interruption must be acquiesced in for the period of one year. Now, the evidence in this case appears to me to amount to this, that up to 1859 no dispute upon this subject ever arose between the college and the freehold tenants of the manor; but in that year Mr. *John Meadows White* was appointed solicitor and steward of the manor, and he seems, in his desire to improve his clients' property, to have taken steps which, if not oppposed, would very speedily have got possession of the whole of the waste as the private property of the Defendants. He took active steps for that purpose, and in several instances he induced persons, by threats, and by commencing legal proceedings, to abstain from doing what up to that time they had been in the constant habit of doing. The instances of those who gave way are detailed in an affidavit by Mr. *Robert Holmes White.*

It was by letter of the 13th of August, 1860, that the college through their solicitor began these proceedings. This letter is as follows: [His Lordship read it.] This produced a considerable effect, but it was very far from being uniformly successful. Some of the tenants gave way—others resisted. For instance, *Joseph Jacobs* did this, as he states in his affidavit. He mentions that for a number of years since 1832 he had always done certain things, and then he says: "I have never been interrupted in any of the said acts, or paid or been asked to pay anything in respect thereof, except on two or three occasions in or about the year 1861, when *Samuel Cooke*, the common-keeper appointed by the lords of the manor, came to me when I was digging for gravel as aforesaid, and told me I was wrong in doing so. I replied that I had a right so to dig, that I had always exercised such right, and always intended to do so; and told him that the lords of the manor had better bring their action against me if they disputed my right to dig, and I would defend it. I thereupon, in fact, continued, and have ever since that time continued, to dig in the same way as I did previously whenever I had occasion to do so. I am at the present

time in the habit of taking gravel from the said common, whenever I require it for the repair of or necessary consumption in my several tenements above mentioned." I am of opinion that this constitutes no interruption acquiesced in. The right is one claimed by all the freehold tenants of the manor; the list of them is numerous. These lists have been made out from time to time. The earliest I think is the 22nd of October, 1691; and the latest is, I think, that made out by Mr. *Hayward*, the late steward of the manor, on the 22nd of December, 1847. Of these freehold tenants, a few are selected to threaten. Of those so threatened, some resist, and some give way. But, by those who dispute the power of the Defendants to interfere with or stop such usage, the taking of gravel, the cutting of turf, and the depasturing of cattle is continued, and is proved to continue, up to the present time. Then how can this possibly be called an interruption acquiesced in in the sense of the Act of Parliament? It is simply a dispute which has occasioned a suit. It is no stoppage of the right claimed. It might possibly, upon the theory of the Defendants that each freehold tenant must claim by a separate and distinct grant, bar the rights of those who did so acquiesce until they had proved their original grant; but it cannot in the slightest degree affect the general rights of the freehold tenants of the manor, who, as a body, have never acquiesced in the claim of the Defendants.

As to *Shoulder-of-Mutton Green*, there is no furze or turf to cut there, but there is distinct evidence that for a long time past it has been used as a place of pastime by the inhabitants of the parish of *Plumstead;* and although this is not proved as a manorial right, it is, I think, proved as a custom belonging to the inhabitants of that place, and this has been held in several cases, but especially in the case of *Fitch* v. *Rawling* (1), to be a valid custom. But it is certainly not on such grounds that this right is claimed by this bill, and I shall not therefore, in the decree which I am about to pronounce, notice *Shoulder-of-Mutton Green.*

Upon the whole, I am of opinion that the Plaintiffs are entitled to the decree they ask, as far as regards pasture and the cutting of turf and gorse on *Plumstead Common* and *Bostal Heath.*

I regret much that the good understanding which seems to have

(1) 2 H. Bl. 393.

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prevailed between the college and the freehold tenants of the manor for centuries up to 1859 should ever have been disturbed, but the increased value for building purposes of the soil in these suburban commons has of late years created much litigation, stirring up antiquated questions of black-letter law—unfortunately at a great expense to the parties concerned, and with little profit to any one who is not a member of the legal profession. Such, however, as it is, it has been my duty to decide the right, which I have done to the best of my ability, upon the evidence before me, both documentary and oral, which, in my opinion, establishes the Plaintiffs' right. The Defendants must pay the costs of the suit.

Solicitors for the Plaintiffs: Messrs. *Fawcett, Horne, & Hunter.*
Solicitors for the Defendants: Messrs. *White, Borrett, & White.*

ATTORNEY-GENERAL *v.* GEE.

V.-C. M.
1870
March 1, 2, 8.

Nuisance—Pollution of Stream—Sewage—Local Board of Health.

Bill and information filed to restrain the local board of health of a town from discharging sewage into a river dismissed with costs on the ground that the injury proved was trifling.

Consideration of the circumstances under which the Court will interfere.

THIS was a bill and information filed by and at the relation of *Richard Hunt*, a millowner on the river *Stort*, against the local board of health for the district of *Bishop Stortford*, and *William Gee*, the clerk to the board, seeking to restrain the pouring of sewage into the river. The facts sufficiently appear from the judgment.

Mr. *Cotton*, Q.C., Mr. *Charles Hall*, and Mr. *Day*, in support of the injunction, cited *Attorney-General* v. *Richmond* (1), and *Attorney-General* v. *Colney Hatch Lunatic Asylum* (2).

Mr. *Pearson*, Q.C., Mr. *H. James*, Q.C., and Mr. *Jackson*, for the Defendants, cited *Attorney-General* v. *Cambridge Consumers' Gas Company* (3), and *Attorney-General* v. *Sheffield Gas Consumers' Company* (4).

Mr. *Cotton*, in reply, cited *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (5).

SIR R. MALINS, V.C. :—

This is an information and bill. The bill, of course, is founded upon a private injury to the Plaintiff, and the injury complained of is an injury to his mill. The Plaintiff is owner of the mill for a term of years, with a right of renewal, and I treat him in every respect as if he were the owner in fee simple. The mill is occupied by his tenant *John Lawrence*, and the private injury which is complained of is, first, that the sewage is accumulated at the bottom of the mill, which causes great inconvenience—a stoppage, in fact,

(1) Law Rep. 2 Eq. 306.
(2) Ibid. 4 Ch. 146.
(3) Ibid. 4 Ch. 71.
(4) 3 D. M. & G. 304.
(5) Law Rep. 1 Eq. 161; Ibid. 1 Ch. 349.

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to a certain extent, of the river; and, secondly, that it has produced such a noisome smell that if the nuisance be not abated the tenant will be obliged to remove. So far as the private injury is complained of, therefore, it is a pecuniary interest and damage only: that his tenant cannot remain and cannot pay him his rent. It is a remarkable circumstance that the Plaintiff coming forward in this cause resides no less than ten miles from *Bishop Stortford*. The tenant *John Lawrence*, it appears, went to reside at the mill in 1865, and occupied it a year without any lease, at a time when the evidence shews, beyond all doubt, that the state of things was much the same, if not rather worse, than it now is. He then elected to take a lease for about twelve years; therefore he has five years to run, at about £100 a year. Both *John Lawrence* and the Plaintiff were cross-examined. Mr. *Hunt* said he had had many complaints from Mr. *Lawrence* of this nuisance, but he was not able to produce any complaint in writing, and I much doubt whether any such complaint was ever made in writing. No application has been made by the tenant for a reduction of his rent, and therefore, to this extent, Mr. *Hunt* has sustained no pecuniary injury whatever. That, therefore, goes to the filling-up of the millpond, or other injuries complained of.

Then with regard to the health of *Lawrence* and his family—for Mr. *Hunt*, being only a casual visitor to the town, has no further interest than that which is derived from the ownership of the mill—the charges in the bill, as to the noxious smell produced, are very strong, and they are supported by the affidavits of *Lawrence*; but on cross-examination, all he said was that he had had pretty good health, but had sometimes been poorly; he had seven children, and he did not know what he had paid for doctors' bills. I am satisfied, therefore, upon the evidence, that the statements in the bill are gross exaggerations, that *Lawrence* has not suffered in health, and that there is no justification for the filing of this bill, so far as it is a bill founded on private injury; and I am satisfied, upon the evidence, that if this had been a bill only it would have been my duty to dismiss it, upon the ground that the injury was so trifling that it would not be justifiable for me to grant an injunction.

But it was felt that the case could not be sustained as a bill

only, and the Attorney-General was applied to, and his sanction to an information was obtained upon the *ex parte* statement of Mr. *Hunt*.

The admitted facts before me are, that the river *Stort* has an average width of forty feet, and from four feet depth in the summer to six feet in the winter. Such a river must of necessity pass a considerable body of water in the course of the day, but I have had no evidence as to the rapidity of the stream. I will, however, assume it to be a sluggish stream, but it must be a very slow stream indeed if it does not pass a yard in a minute, which would give 160 cubic feet of water per minute. The evidence is also silent as to the comparative volume of sewage and the volume of water in the river, which are very material questions. This bill was filed in July, 1868; and it is a matter of history that the summer of 1868 was extraordinarily warm, and it may very possibly be that in such a season there might have been more smell from the river than would ordinarily arise.

It is impossible to read the evidence given by Mr. *Hunt*, without seeing that he has exaggerated to an enormous extent; if the facts had been as he states, there are plenty of inhabitants of *Bishop Stortford* who must have been great sufferers, and yet not one of them has come forward to complain. It seems that Mr. *Hunt* commenced his correspondence with the local board in February, 1868, when his complaint was respecting the private injury by the blocking-up of his millpond, but there is no mention of the nuisance arising from the smell till the July following. His whole ground of complaint from February to July was the stopping-up of the river, but the first allegation about the smell was in an affidavit made by him the day after the information was filed, wherein he states that several persons in the neighbourhood of the river had suffered in health from the effects of the nuisance, and that divers persons had been obliged to leave the place on account of ill-health occasioned thereby; and then he mentions the case of his tenant *Lawrence*, who had threatened to leave the mill if the nuisance was not abated. Now, when *Lawrence* was cross-examined, he did not in any way confirm that statement, and I am satisfied that neither he nor his family ever suffered in health from the effects of the river, and that he never had an idea of leaving the mill on that account.

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Then, as regards the statement that divers persons have left the neighbourhood, that turns out to be wholly unfounded, and it has not been suggested to me that a single person has left the neighbourhood in consequence. I think no one will deny that pouring the sewage, or a large portion of it, from a town like *Bishop Stortford*, with between 4000 and 5000 inhabitants, into the river, must be a nuisance to some extent; but it is one which has existed in this town for very many years, and I am satisfied on the evidence that there was no material change within the last five years before the information was filed, and that nothing existing at that time afforded any excuse for entering into this litigation.

[The VICE-CHANCELLOR then referred to the evidence of several other witnesses on behalf of the Relator, all of whom resided at a distance from *Bishop Stortford*, though some of them lived near the river *Stort*, and whose evidence confirmed the statements in the bill as to the smell arising from the water. His Honour then continued :—]

If the matter had rested upon the evidence of these witnesses alone, and I had no contradiction to their testimony, it would have shewn that this river is in an unsatisfactory condition. It cannot, in fact, be a pure river for the reasons I have stated; but the question which I have to decide is, whether when the information was filed any material change had taken place, or was likely to take place, which would be prevented by this information—whether any benefit would, in point of fact, arise from it. When I go to the evidence on the other side, nothing can be more positive than the contradiction which the evidence of the Plaintiff receives.

[The VICE-CHANCELLOR then commented at considerable length upon the evidence on behalf of the Defendants, in which it was stated that since the month of March, 1867, no sewer or drain whatever had been laid in any part of the district by the local board: that no new system of drainage had been adopted, that the board had not caused any of the old privies and cesspools to be removed, nor substituted therefor a system of waterclosets discharging themselves into the sewers of the district: that there had been no increase of offensive smell since March, 1867; and that

the water was not in such a state that it could by possibility have caused the bad effects alleged by the Plaintiff's witnesses to have arisen, or to be a serious nuisance, or injurious to health. The numerous witnesses for the defence were chiefly resident in the town of *Bishop Stortford*, and included medical gentlemen and persons of position in the town, all of whom swore positively that there was no greater nuisance arising from the river now than had been the case for many years past; that the town was considered a very healthy residence, and no cases of fever or other illness had arisen in consequence of the state of the water; that the river was used for boating, as it always had been; that there was an abundance of fish constantly caught in the river, and that the statements made by the Plaintiff's witnesses were either wholly untrue or grossly exaggerated. His Honour then continued :—]

I have gone through the evidence in this cause at far greater length than I should have done, and with more minuteness, on account of the very great importance of the subject. It is of the highest importance that where a river passing through a town is polluted by the sewage, the doctrines of this Court should be maintained; in fact, it has become settled that that is a subject for the interference of this Court. I allude particularly to the *Colney Hatch Case* (1). I felt much difficulty in that case, and I did not ultimately interfere, but referred it to an eminent engineer officer, to report what the state of things was, and what it was desirable to do. From my order made on that occasion there was an appeal, and the Lord Chancellor and Lord Justice did interfere, and granted an injunction. But, as is usual in these cases, from time to time they extended the period for that injunction coming into force, and I believe that I am right in saying that it has not come into force even to the present day, although the injunction granted by the Court is now a year and a half or two years old. But there, the *Colney Hatch Asylum* having 2500 inmates or thereabouts, the sewage was drained into a small stream, about four feet wide, which a person could step across. Here it is a river forty feet wide by four feet deep. There, no doubt, it was a nuisance, but the impracticability of the Court doing anything was so great that really nothing has ever been done. Therefore, although it is of the very

(1) Law Rep. 4 Ch. 146.

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highest importance that the Court should interfere in a proper case, it is, I think, of equal importance that it should not interfere except in a proper case.

Now, I have already disposed of this suit so far as it is a bill to restrain a private nuisance, and I have shewn that, upon that ground, it is wholly unsustainable. Is it, then, sustainable so far as it seeks to restrain a public nuisance? I think, upon the weight of evidence which I have read and referred to, it is perfectly clear that there was no justification for filing this information at the date at which it was filed. I have no doubt that the state of things was worse in the month of July, 1868, than it had been for some time before, on account of the extreme heat of the weather at that time. But the witnesses, whose evidence I have read, shew distinctly that it was worse in 1864 and 1865 than it was even in 1868. This is not a case in which it can be said there is no nuisance. There is a nuisance, no doubt, as there always must be when a town is drained into a river; but is there any alteration in the state of things shewn to have taken place? Is there any justification for filing the information at that particular time, or anything to shew that if the Court interferes its interference will be of any practical utility? I am of opinion, most distinctly, on the evidence before me, that no new circumstances whatever had occurred in July, 1868, to justify the filing of this information, and I cannot come to the conclusion that any order granted by this Court can be of any practical utility. It further appears, upon the evidence before me, that at that time there was a bill before Parliament, which had passed through all its stages, and only awaited the royal assent (the present informant, Mr. *Hunt*, being a promoter of the bill, as he stated in cross-examination), and I am of opinion that that bill has afforded a remedy for all these evils by Act of Parliament. It has fixed upon its own remedies, and pointed out what they shall be if there is a disobedience to its enactments, which are, that from and after the 1st of July, 1870, none of the sewage from this town—none whatever—shall be poured into this river.

Under these circumstances, looking at the fact that the Plaintiff and informant is not an inhabitant of the town; that he has interfered, so far as public nuisance is concerned, in a matter in which

he had no interest; that he has come forward to do that which the great bulk of the respectable inhabitants of the town tell me it was unnecessary to do; that his case is founded on untruth or gross exaggeration; that there is not that degree of nuisance which he has described, but, on the contrary, nothing to be complained of; that the health of the inhabitants has not been interfered with, and is not likely to be interfered with:—and looking at the state of things when this information was filed, can I come to the conclusion that there was a sufficient justification for putting this information on the file? I am clearly of opinion there was not. The conduct of the parties themselves shews that there was no justification, because if anything new had occurred there would have been an injunction obtained at once; but it is a case in which an interlocutory application was made, but was not persisted in. So weak did the learned counsel for the Plaintiff find his case to be, that he could not persist in his motion for an injunction in July, 1868, and he virtually did not do so in November, 1868; and the result is that the hearing of this cause has stood over until this time, the month of March, 1870, when in four months' time this Act of Parliament will come into full operation, and will oblige this board to discontinue the pouring of the sewage into the river in any way whatever.

I had occasion to consider the law applicable to this matter in the case of *Lillywhite* v. *Trimmer* (1), in which all the authorities on this subject were cited, and amongst those authorities the case of *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (2), mentioned by Mr. *Cotton* in reply, in which the law is laid down by Lord Justice *Turner* in these terms: "This brings us to the question whether the nature and extent of the nuisance in this case is such that this Court ought to interfere by injunction to prevent it. I have throughout felt this point to be one of some difficulty. I adhere to the opinion which was expressed by me, and by the Lord Chancellor, in *Attorney-General* v. *Sheffield Gas Consumers' Company* (3), that it is not in every case of nuisance that this Court should interfere. I think that it ought not to do so in cases in which the injury is merely temporary and trifling, but I

(1) 36 L. J. (Ch.) 525.
(2) Law Rep. 1 Ch. 349.
(3) 3 D. M. & G. 304.

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think that it ought to do so in cases in which the injury is permanent and serious; and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it." The injury here is in the course of being abated in the manner I have pointed out. The injury when this information was filed, I am satisfied, was not greater or different to what it had been ten or twenty years before. Therefore, upon these grounds, I am unable to see that there could possibly be any advantage derived by interfering by injunction. I think the case of the Plaintiff wholly fails, and the information must be dismissed.

I quite agree with the law as stated by Mr. *Pearson*, who referred me to the passages in the *Sheffield Gas Case*, in which the Court of Appeal—the Lords Justices and Lord *Cranworth* in particular—laid down the rule that the question of law is, "whether the case is one calling for the interference of the Court." They also laid down the rule, that when it is an information, the Attorney-General cannot obtain the interference of the Court, unless upon a case which he establishes, so far as he is concerned in it, as distinctly as an individual has to establish his case.

This is an information and a bill, but, as I have already pointed out, the information is upon the relation of the Plaintiff; and the Attorney-General having failed to prove that there is that extent of annoyance and nuisance from this river which is complained of in that bill, I cannot, because it is an information, give relief any more than I could if it was a case of private injury. I am therefore of opinion, whether I regard it as a private injury or as a public matter, that the case entirely fails. I suppose, Mr. *Pearson*, you press for costs?

Mr. *Pearson*:—Yes, certainly.

SIR R. MALINS, V.C.:—

The difficulty I feel upon that subject is this: If I do not give costs, somebody will have to pay the costs that have been incurred. The Defendant *Gee*, of course, cannot be called upon to pay them personally. Therefore, if I do not give the costs against the Plaintiff, there must be a rate upon the inhabitants of *Bishop Stortford*. I am unable to see any principle of justice on which I

could call upon the inhabitants of that town to be taxed for the purpose of paying for an information filed at the relation of a gentleman who is an entire stranger, and who could have been actuated only by the desire to protect his own property. I shall, therefore, dismiss the bill and information with costs.

V.-C. M. 1870 ATTORNEY-GENERAL v. GEE.

Solicitors: Messrs. *Rooks, Kenrick, & Harston;* Messrs. *Walker & Sons.*

WRIGHT *v.* LARMUTH.

V.-C. M. 1870 *June* 4.

Practice—Special Examiner—Fees and Charges—Regulations subjoined to Consolidated Orders, Schedule 1.

The sum of £2 2*s.* a day, which a special examiner is entitled to receive for his expenses under the regulations subjoined to the Consolidated Orders, is a fixed sum payable in every case, without reference to the amount of expenses actually incurred by the special examiner, and does not include the expense of hiring a room for the purpose of the examination.

THIS was an application to review the taxation of a bill of costs as between party and party.

Among the items the allowance of which was objected to, were the fees and charges of a special examiner at the rate of five guineas a day, and the expense of hiring a room for the purpose of the examination.

Mr. *A. E. Miller*, for the Applicant:—

First: The sum of £2 2*s.*, payable to a special examiner for his expenses under the first schedule to the regulations subjoined to the Consolidated Orders, is not payable in every case without reference to the expenses actually incurred by the examiner, but was intended to be the maximum sum to be allowed for such expenses; so that the examiner is only entitled to receive (in addition to the £3 3*s.* for every day in which he is *bonâ fide* employed in the examination of witnesses) the actual amount of his expenses not exceeding £2 2*s.* a day.

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Secondly: The allowance for the expenses of the special examiner includes the expense of hiring a room for the examination.

Mr. *Bristowe*, Q.C., for the Respondent, was not called upon.

SIR R. MALINS, V.C.:—

I am clearly of opinion that under the regulations a special examiner is entitled to receive five guineas a day. Of this sum two guineas are made payable for his expenses, but that does not mean that he is to be paid the amount of expenses actually incurred not exceeding two guineas a day; on the contrary, the sum is fixed to be paid in every case for the purpose of avoiding disputes as to the actual amount of expenses.

As to the expense of hiring the room, where, for the convenience of the parties, the examination cannot be held at the special examiner's chambers, office, or house, and it is necessary to hire a room, the expense of hiring it is not to be borne by the special examiner. I must, therefore, disallow both these objections.

Solicitors for the Applicant: Messrs. *Wedlake & Letts.*
Solicitor for the Respondent: Mr. *H. H. Lawrence.*

BANKART *v.* TENNANT.

V.-C. J.
1870
Feb. 23, 24, 25; March 16.

Lessor and Lessee—Agreement for Lease—Copperworks—Easement of Plaintiff to take Water from Defendant's Canal—Mutual Understanding—Acquiescence—Standing by.

The Defendant being the owner of a canal of which the Plaintiffs were large customers, a mutual understanding was come to between the parties, that so long as the Plaintiffs remained good customers of the canal, they should be allowed to use the superfluous water of the canal for the purposes of copperworks, of which they were occupiers under an agreement for lease with the Defendant. It was shewn that the use of the water of the canal, though convenient and economical, was not absolutely essential to the Plaintiff's works:—

Held, that such an understanding did not form the foundation of an equitable right.

Secus, if the Plaintiffs with the knowledge of the Defendants had incurred expense in establishing a manufacture for which the use of the water was absolutely necessary.

Clavering's Case (1) considered.

AMONG the questions raised in this suit was the following:—

By an agreement in writing, dated the 29th of September, 1843, and made between *Margaret Elizabeth Tennant*, widow, of the one part, and *William Kirkhouse* of the other part, after reciting that *Kirkhouse* had erected furnaces and works for the smelting or manufacture of spelter and zinc, and intended to erect cottages and other buildings on two pieces of land, then held by Mrs. *Tennant* for the residue of a term of 1000 years, granted by the then Earl of *Jersey*, it was witnessed that Mrs. *Tennant* agreed to grant, and that *Kirkhouse* agreed to accept, a lease of two pieces of land in the parish of *Cadoxton-juxta-Neath, Glamorganshire*, containing 2A. 1R. 13P., or thereabouts, which pieces of land were more particularly described in a plan drawn upon the agreement, and also all furnaces and buildings erected or to be erected thereon, for ninety-nine years from Lady Day, 1843, at a yearly rent of £3 10*s.* It was thereby agreed, that in the intended lease provision should be made for enabling *Kirkhouse*, during the term of ninety-nine years, to carry over every part of any canal or canals of Mrs.

(1) 5 Ves. 690.

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Tennant, coal or other fuel to the demised premises, and also to carry any ores or metals to or from the demised premises, and also all other articles at a fixed rate per ton.

No lease was ever granted to *Kirkhouse*, who was already in possession, and so remained, under the above agreement, until some time previous to the 31st of March, 1849, when the premises were agreed to be sublet by *Kirkhouse* to *Frederick Bankart* (who was then already in possession), with an option of purchase.

Frederick Bankart thereupon converted the existing zinc-works, which were called the *Red Jacket Works*, into works for the manufacture of copper. He afterwards exercised his option of purchase, and by a deed dated the 6th of December, 1855, the agreement of September, 1843, and the premises and works therein comprised, were, in consideration of £1000 paid by *Frederick Bankart*, assigned by *Kirkhouse* (by the direction of *Frederick Bankart*) to *Robert Passenger*, who afterwards, by deed dated the 26th of September, 1851, mortgaged, and finally, by another deed, dated the 10th of September, 1859, relinquished all claim to the land, works, and premises to *Frederick Bankart*.

In 1865 *Passenger* died.

This bill was filed on the 10th of February, 1868, by *Frederick Bankart*, and his son and partner, *Howard Bankart*, and, as amended, was against *Charles Tennant*, the surviving trustee of a voluntary settlement made by *Margaret Elizabeth Tennant*, and the executors of *Robert Passenger*, as Defendants.

It alleged, amongst other things, that the premises comprised in the agreement of the 29th of September, 1843, were agreed to be demised to *Kirkhouse* for the purpose of carrying on the manufacture of zinc; that a considerable quantity of water was necessary for such manufacture; that there was at the time of making the agreement no water-supply on the pieces of land, except what might be derived from the *Tennant* canal; that it was known to the parties that such supply was necessary for the manufacture; and that it was understood between them, that *Kirkhouse*, and all parties claiming under him, should be at liberty to use the water for the purposes of the manufacture, provided the water was not abstracted to the prejudice of the navigation.

Further, that when the Plaintiff *Frederick Bankart* converted

the works into copperworks, a supply of water being necessary, a culvert, for the sole purpose of supplying water to the works, was made with the express sanction of *Henry Tennant*, the then acting trustee of the settlement, and under the superintendence of *Kirkhouse*, then employed by Mrs. *Tennant* and her trustees as engineer; that *Kirkhouse* and the Plaintiffs had, with the knowledge and approbation, first of Mrs. *Tennant*, and afterwards of *Henry* and the Defendant *Charles Tennant*, used the water from the year 1843 downwards, without interruption or question, and claimed a right to such user both by actual agreement and by acquiescence.

In December, 1866, the Plaintiffs received a letter from the Defendant *Charles Tennant's* solicitors, demanding a royalty of £500 a year for the use of the water already taken, and £5 per day by way of penalty for future user. After an abortive negotiation, *Charles Tennant* commenced an action against the Plaintiffs for using the water.

The bill alleged, and the answer did not deny, that *Charles Tennant* was now, virtually, the absolute owner of the settled estates.

The bill prayed for a declaration (amongst other things) that the Plaintiffs were entitled to use the water of the canal for the purposes of their works, not interfering with the navigation; and for an injunction to restrain the action.

It appeared that in 1852 a correspondence took place, in which a grant of the use of the water was demanded on one side and refused on the other.

The Defendant *Charles Tennant*, by his answer, said that neither of the two pieces of land comprised in the agreement of September, 1843, abutted on the canal; that neither before or after the date of that agreement had *Kirkhouse* any right to the water of the canal for any purpose whatever; nor had he used the same except in very small quantities.

He said he believed that *Kirkhouse* did, without interference, but without permission, use the water of the canal, for the purposes of his manufacture, to the extent of a few bucketsful a day; but he denied that there was any agreement or understanding that he should have the right to do so.

Speaking to the best of his belief, he denied that a culvert for

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supplying the works with water was made in 1849, or at any other time, with or without the sanction of *Henry Tennant*, or under the superintendence of *Kirkhouse*.

He further stated as follows:—

"Speaking to the best of my belief, I say that, in the year 1855, I first became aware that the Plaintiffs were abstracting water from the said canal for the purpose of their works. I had previously to that year been aware that a small quantity of water had been taken by the Plaintiffs for the purpose of their works; but, inasmuch as up to that time the Plaintiffs had carried their goods exclusively on the *Tennant* canal, and had paid tonnage for the same, I had not thought it worth while to interfere with the Plaintiffs in a moderate use of the water; but in or about the month of May, 1855, I was informed by the said *William Kirkhouse*, and therefore I believed, that the Plaintiffs were abstracting large quantities of water from the canal, so as to impede the navigation; and accordingly, on the 24th of May, 1855, I wrote and sent to the Plaintiff *Frederick Bankart*, or his son *Arthur*, a letter of that date, which was as follows:—

"'*Russell Square*, 24th May, 1855.

"'*A. F. Bankart*, Esq.

"'Sir,—I have deferred answering your letter of the 19th instant until I heard from Mr. *Kirkhouse* on the subject. I have received his answer to-day, and as he recommends me not to consent to your proposal for using the old gate, I beg to inform you that I object to your using it. Mr. *Kirkhouse* informs me that you are frequently wasting large quantities of water from our canal, to the great inconvenience of our trade thereon. I must request you to discontinue that practice.

"'I am, Sir,

"'Your obedient servant,

"'*Chas. Tennant.*'

"I submit that the non-interference by me previously to the month of May, 1855, with the use by the Plaintiffs of the water of the canal did not amount to a license to use the same water, or that if my non-interference with them did amount to a license, then such license was revocable; and I say that since my said

letter of the 24th of May, 1855, the Plaintiffs have taken water from the said canal against my consent, though, for the reasons herein appearing, I have been unable, until the beginning of the present year (1868), to take active steps to prevent the Plaintiffs from abstracting water from the said canal. Speaking to the best of my belief, I deny that the water required for the purpose of the Plaintiffs' manufacture cannot be obtained from any other source than the said canal; for I say that my solicitors have been informed by the Plaintiffs' solicitors, in the course of correspondence, that the Plaintiffs have on their works a powerful steam-pump capable of supplying them with water, and that the enjoyment of the water from the *Tennant* canal is of but little moment to the Plaintiffs."

The results of the evidence are given in His Honour's judgment.

Mr. *Kay*, Q.C., and Mr. *Cadman Jones*, for the Plaintiffs.

Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, for the Defendant *Charles Tennant*.

Mr. *W. F. Robinson*, for the other Defendants.

SIR W. M. JAMES, V.C.:—

This suit is instituted for three main objects. [His Honour disposed of the first two points, deciding the first, as to specific performance of the agreement for a lease, in favour of the Plaintiffs, and the second in favour of the Defendants, and continued:—]

Then there comes the third object, which is much more important, in point of law and of principle, than the others.

The Plaintiffs say they took the piece of ground for the purpose of copperworks, and from the year 1849, when they took it, down to the year 1866, they were in the enjoyment of a supply of water, which water was very important to their works, from a canal of which the Defendant *Charles Tennant* and his co-trustees were the owners. They say they were in the actual enjoyment of that water, without dispute or interruption, from the year 1849 to the year 1866; but it cannot be said without question, because the very same question which is raised by this suit was, in fact, raised in the year 1852, when certain letters passed between the parties,

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in which on one side it was contended that there should be an actual grant of the said right to the water, and on the other side that grant was refused. The question must be, in fact, considered to have been in abeyance and suspense from 1852 down to the present time, neither party being, in my judgment, either benefited or injured by anything that has occurred since the year 1852. It must be tried, therefore, as if it was in that year.

Trying it as it was in that year, the Plaintiffs say: "It was of great importance to you, that there should be works erected upon the side of the canal. The increase of traffic upon the canal was, in fact, a thing of great importance to you, and we erected our works and carried them on, not only using the water with your acquiescence and assent, but with your direct encouragement, which is evidenced most clearly by a letter written by the Defendant *Charles Tennant* himself, in the year 1851, with reference to a new tariff of tolls on the canal which he had then established. That letter expressed in the strongest possible terms his desire to promote the extension of the works." It is suggested, therefore, that these facts have brought the case within the principles laid down in the great case of *Ramsden* v. *Dyson* (1), in which a decision of Vice-Chancellor *Stuart* was reversed by the decision of a majority of the Lords. The principle applicable to that case appears not to have been at all in question, either in the Court below or in the House of Lords itself; the contest arose on the application of the principle to the facts. The principle laid down by Lord *Kingsdown* (2) is this: "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

Here the actual thing was not laying out money upon the water, but it is suggested that the Plaintiffs did erect works upon the land, and did take possession of the water-communication

(1) Law Rep. 1 H. L. 129. 12 Jur. N.S. 526

(2) Law Rep. 1 H. L. 170. 12 Jur. N.S. 517

between the canal and the works, under an expectation, created and encouraged by the landlord, that they should have the continued enjoyment of that water.

A case which is referred to in another case of *Powell* v. *Thomas* (1) is a very strong instance of the interference of the Court when acting upon that principle. In *Clavering's Case* (2), Lord Chancellor *Loughborough* says: "There was a case (I do not know whether it came to a decree) against Mr. *George Clavering*, in which some person was carrying on a project of a colliery, and had sunk a shaft at a considerable expense. Mr. *Clavering* saw the thing going on, and in the execution of that plan it was very clear the colliery was not worth a farthing without a road over his ground, and when the work was begun he said he would not give the road. The end of it was that he was made sensible, I do not know whether by a decree or not, that he was to give the road at a fair value."

Therefore, if in this case it had been made out to my satisfaction that the water in question was essential, or anything like essential, to the enjoyment of the property in question, I think I should have found my way to have given the Plaintiffs the relief which they ask.

But in approaching the question one has to consider this—that, however convenient, however economical, the supply of water from a particular source may be, it is scarcely possible to say that the having it from that particular source is essential to the works. One knows perfectly well that there is scarcely any place in *England*—certainly not on the seashore, where this property is situate—where water cannot be obtained by sinking a pit and erecting a steam-engine: and in this particular case there is evidence that the Plaintiffs have said that they had provided themselves with the means of supplying water for their works. Therefore it cannot be considered essential in the sense of absolute necessity. Still, if it were of anything like the value to the Plaintiffs as that at which the Defendant *Charles Tennant*, in the course of these proceedings, has assessed it, I think I should have been disposed to consider the question very much as was done in the case of Mr. *Clavering:* that is to say, if, after encouraging the

(1) 6 Hare, 300. (2) 5 Ves. 690.

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Plaintiffs to erect their works, he had said, "Though there is surplus water, so far as I am concerned I will make you ransom the water; I will put in force my legal right, and make you pay £500 a year for it"—I think I should in that case have been disposed to consider it as coming within this principle. I am satisfied, however, that the amount of that value is a mere idle estimate, either as representing the benefit to the Plaintiffs, or the value of it to the Defendant.

Then there is this further matter to be considered. Of course the Defendants, or the persons having then the management of the *Tennant* estate, could never have intended to bind themselves by any contract or agreement which would interfere with their absolute possession of, and control over, this canal. It is difficult to conceive any grant of this water which would not have interfered with that. I think they could never have intended to enter into any agreement which would prevent their letting the water off, if they liked, or keeping the canal idle for any length of time. They never could have intended to deprive themselves of the right to let other persons use the water, and I do not think the Plaintiffs could have acted upon the notion that they were ever to get a binding legal or equitable agreement with respect to the enjoyment of the water. The position of the parties appears to me to be this: The Plaintiffs were about to become, and afterwards did become, very valuable customers of this canal. The water in question was merely waste water, which could not have been used by the lessors, and which would have gone over the weir into the sea; and there was a sort of mutual understanding between the parties of this nature, "So long as you are good customers of ours, and are using our canal, we shall not quarrel with you about the use of water which is of no value to us." Therefore the Plaintiffs might very reasonably expect that there would be no dispute between them, and in all probability there never would have been any dispute between them with respect to the water, if there had not been other disputes or quarrels, which arose between them in respect of the agreement between the Plaintiffs and Mr. *Henry Tennant*. That kind of understanding, that as long as they were good customers they should have the accommodation, does not appear to me to be the foundation of any equitable right which it

would be possible to reduce into any form of language whatever that would express the extent of the obligation.

I therefore think the Plaintiffs must be considered to have failed on that part of the case, and that the understanding between them was not such as to amount to the equitable right which is referred to in the cases I have mentioned. I must say, taking the case to have been one of such an understanding as I have mentioned, I think the Plaintiffs might fairly say, "You must not interrupt us or our works;" and it would not be reasonable for the other side to say, "If you do not pay a large sum of money, we will stop your works at a day's notice." I think the letter of Mr. *Charles Tennant*, saying "I call upon you to pay me £500 a year for the water, and if you do not pay it I will stop your supply at once," is a most unreasonable and unconscientious proceeding. Mr. *Charles Tennant* ought to have said, "Unless you acknowledge my right, I must take steps to enforce my legal right." That would have been the reasonable and proper thing to do, but that demand was a most extravagant and unreasonable demand.

Now with respect to this question of the water, I have another question to decide, arising from what was done when the action-at-law was stayed. An undertaking was given in the case, by which, in fact, I have to assess the compensation to which the Defendant *Charles Tennant* is entitled in respect of the water in the event of the Plaintiffs failing to establish their right to it, as in my opinion they have failed. There is a witness who swears that the water is worth £100 a year. I expressed my opinion upon that in the course of the hearing. I am satisfied, having regard to the price charged for the water for other purposes at the lock, that the sum I mentioned during the course of the proceedings of £5 a year is an ample compensation for all the use of the water which the Plaintiffs have had. I therefore assess that sum accordingly.

This brings me to the consideration of that which has given me some trouble—namely, as to what ought to be done with the costs of the suit. The Plaintiffs have succeeded in establishing their right to specific performance. It is said that the Defendants did not dispute the right to specific performance. That is not quite so, because the Defendant *Charles Tennant* submitted to the

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performance only upon a condition precedent, which I hold he was not entitled to insist upon. On the other hand, the Plaintiffs have failed, and failed entirely, with respect to the agreement which they have set up between them and Mr. *Henry Tennant*, and of the invalidity of which they must have had clear notice before they filed their bill. With regard to the water, they have failed; and though, as I have said, the demand of £500 a year was an unreasonable demand, and they ought to have had reasonable notice to provide themselves with other water, still there is this to be observed—that although the demand was made in the year 1866, no actual proceedings were taken till the year 1868, during which time the Plaintiffs might have supplied themselves with water, and might have done that which they have since done—namely, sink a well, and put up a steam-engine. Therefore they have filed their bill after having had considerable notice that the first Defendant was disputing their right to the water. That being so, I do not think that I ought essentially to alter the decision as to costs, by reason of what I have said as to the conduct of Mr. *Charles Tennant* in making that demand. It therefore resolves itself into this: the Plaintiffs have succeeded in one-third of their suit, the Defendants have succeeded in two-thirds of the suit. I do not think it would be for the benefit of the parties that I should send them to the Taxing Master to have the costs apportioned between the one part and the other. I think it would be for their benefit, and that it would be more just to decide it now, and to say, that the Plaintiffs having succeeded on one-third, and having failed on two-thirds of the suit, setting off the one against the other, the Plaintiffs will have to pay the Defendants one-third of the costs of the litigation.

There will be a decree for the specific performance of the lease. The rent will be inserted with the reduction I have mentioned.

With regard to that, it was insisted that the lease should be antedated. Now, I have a great, if not insuperable, objection to antedating a document. I do not like the Court making a thing appear to be that which it is not. I think, therefore, that I ought not to insert any other date than the real date of the execution of the instrument. If there were any demand arising under the lease which the parties would be entitled to if the lease had been

executed at the time, then that ought to be disposed of in this Court before the lease is executed. There is an amount of rent which is due under the agreement for the lease, and that is the only thing for which the lease could be antedated. That rent will be the rent on the reduced scale from the year 1855, when the title of the Plaintiffs was perfected by their obtaining an assignment of the rights from the original lessee.

There will be an order for the payment of that rent from the date of the assignment to the Plaintiffs from *William Kirkhouse* in 1855. I take the date of the assignment as the result of certain proceedings in Equity. The lease will have to be settled in Chambers if the parties differ.

The above decree only deals with the costs up to the present time. The costs of the executors must be paid by the Plaintiffs, and the Plaintiffs must undertake to give them the same interest in respect of the lease as they had in respect of the agreement. The £5 rent to be payable from December, 1866, the date of the notice.

Mr. *Karslake*, Q.C., asked that the Plaintiffs might be put under an undertaking not to use the water any more.

The VICE-CHANCELLOR said he could not do that; the first Defendant must be left to his right of action. There would be liberty to apply as to subsequent costs, if necessary. The bill must be dismissed as to those portions of it in which the Plaintiffs had failed.

Solicitor for the Plaintiffs: Mr. *E. Peacopp.*
Solicitors for the Defendants: Messrs. *Finch & Jennings.*

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ATTORNEY-GENERAL *v.* WEST HARTLEPOOL IMPROVEMENT COMMISSIONERS.

Improvement Commissioners—Application of Moneys produced by Rates—Costs of Promotion of Bill in Parliament—Injunction.

11 Eq. 81
6 Ch. D. 541
10 Ch. D. 214

By a Local Improvement Act, passed in 1854, Commissioners were incorporated, and a district was defined; and the Commissioners were empowered to cause to be paved, drained, and otherwise improved, the town and township comprised in the district, and to be the surveyors of highways within the same, and keep the same in repair; to "do all acts, matters, and things for promoting the health, comfort, and convenience of the inhabitants" of the district, which they might deem or consider necessary, and "for that purpose" to "exercise all the powers vested in them" by the Act and the Acts incorporated therewith, amongst which were the *Companies Clauses Act*, and parts of the *Towns Improvement Clauses Act*, 1847.

The Court granted an injunction to restrain the Commissioners from applying any moneys produced by rates towards the promotion of a bill in Parliament the object of which was to obtain an extension of their district.

BY the *West Hartlepool Improvement Act*, 1854 (17 Vict. c. xli.), after reciting that it would be of material benefit and advantage to the inhabitants of the town of *West Hartlepool* and township of *Stranton*, in the county of *Durham*, if certain persons were incorporated Commissioners, as thereinafter mentioned, with sufficient powers for various specified purposes, it was, amongst other things, enacted (sect. 2) that the limits of the Act should comprise so much of the township of *Stranton* (including the town of *West Hartlepool*) as was included within a dotted line . . . .; and sect. 18 enacted as follows:—

"That the Commissioners shall and may, subject to the provisions of this Act, and the Acts incorporated herewith, cause to be paved, drained, lighted, cleansed, watched, watered, and otherwise improved and regulated, the said town of *West Hartlepool* and township of *Stranton*, within the limits of this Act, and shall be the surveyors of highways within the same, and as such shall have and exercise the entire control and management of all highways, footbridges, and thoroughfares within the limits of this Act, and shall keep the same in repair; and shall and may do all acts, matters, and things for promoting the health, comfort, and convenience of the

inhabitants of the said town and township within the limits of this Act as they may deem or consider necessary, and for that purpose may exercise all the powers vested in them by this Act and the Acts incorporated herewith."

With the special Act was incorporated the *Companies Clauses Act*, and by the 19th section certain clauses of the *Towns Improvement Clauses Act*, 1847, were incorporated into the Act, including clauses "with respect to the rates by the said *Towns Improvement Clauses Act* directed to be made for sewers, drains, and private improvements, except sects. 158 to 160, both inclusive; with respect to the manner of making rates authorized by the said *Towns Improvement Clauses Act* or this Act, except sect. 167; with respect to the appeal to be made against any rate, and with respect to the recovery of rates."

By sect. 69 the Commissioners were empowered to borrow at interest, upon mortgage, sums not exceeding £13,250, for or towards the purpose of defraying "the expenses of preparing, obtaining, and passing this Act," and providing or obtaining sites for and constructing and acquiring and maintaining various public buildings. They were also empowered to borrow at interest, on mortgage, any sum not exceeding £13,000, "for all or any of the purposes of this Act, other than those for which money is hereinbefore specifically authorized to be borrowed;" the repayment of such sums to be secured by mortgage of the rates.

By sect. 80 the money authorized to be raised on mortgage and from the rates was to be applied, first, in payment of "the costs, charges, and expenses of or incident to the obtaining and passing of this Act;" secondly, in paying the interest; thirdly, in setting apart a sinking fund; and fourthly, "in carrying the several purposes of the Act into execution."

The Commissioners, at some period between the 17th of May, 1859, and May, 1866, adopted the *Local Government Act*, 1858, and became a local board under that Act.

In December, 1869, the Commissioners caused to be introduced into Parliament a bill "for extending the limits of the district under the authority of the *West Hartlepool Improvement Commissioners*, and for making better provision for the improvement and government of the extended district, and for other purposes;" the

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objects of the bill being to consolidate enactments in force relative to the improvement and government of the district, to extend the powers of the Commissioners, to extend the district, and for other purposes; and to enable the Commissioners "to borrow further sums for the purposes" of the Act.

This information was filed on the 23rd of March, 1870, by the Attorney-General, at the relation of *William Sadler*, *William Metcalfe Meredith*, and *John Wood*, ratepayers of the district, against the Commissioners and *William Wilkinson Brunton*, their clerk and solicitor, stating that the Commissioners were promoting the bill, had incurred expenses, and intended to incur further expenses; that their bill contained 176 printed pages, and had been and was intended to be opposed in both Houses of Parliament; that the relator had ascertained, for the first time, on or since the 9th of March, 1870, that the Commissioners had applied certain moneys, part of the rates levied by them under their statutory powers, in part payment of the costs already incurred in the promotion of the bill, and intended to expend further moneys out of the rates in paying the expenses incurred in the promotion of the bill; charging that the rates were applicable by law only to certain specific public purposes within the district, which did not include the payment of any portion of the expenses of promoting the bill; and that the payment of such expenses out of the rates was wholly unauthorized and illegal; and prayed "that the Defendants, the *West Hartlepool Improvement Commissioners*, and the individual members of such commission, and their clerks, treasurer, solicitors, and agents, may be restrained by the injunction of this Honourable Court from applying any moneys heretofore produced, or hereafter to be produced, by the rates and funds under their control as such Commissioners, or any of them, or any other moneys now received or hereafter to be received by them from any other sources not legally applicable towards payment of such expenses as hereinafter mentioned in or towards the payment of any costs or expenses heretofore incurred, or hereafter to be incurred, by them in or in relation to the preparation, introduction into Parliament, or promotion of the said bill, or otherwise in relation to such bill, or in or towards the payment of any of the costs or expenses of any opponent or late opponent of the said bill, either as an

inducement to withdraw such opposition or otherwise, or for any other illegal purpose, and from making, or levying, or ordering, or procuring to be made, or levied, or paid over to them, any rates or rate, or any portion thereof, for or towards any such purposes."

From the evidence of Mr. *Brunton*, the clerk to the Commissioners, it appeared that in the latter part of January, 1870, after compliance by the promoters of the bill with the Standing Orders of the House had been proved, it came to the knowledge of the Commissioners that a project was on foot for the formation of a separate district, which was intended to extend over the "additional district" contemplated by the bill; and a memorial to the Secretary of State was, in January, 1870, presented by the owners and occupiers who promoted the separate district, including the present relators. This memorial was opposed by the Commissioners, and the inspector deputed by the Secretary of State had since reported against the formation of such separate district.

From the evidence of Mr. *Turnbull*, one of the Commissioners in defence, it appeared that the object of the Commissioners was to extend the district so as to include an area within which, during the last few years, several manufactories and dwelling-houses had been built, and which was very imperfectly drained. The Commissioners had at first endeavoured to effect the extension by means of their permissive powers, but the project having been opposed, especially by the owners of one manufactory, an application to Parliament became necessary. The bill had received the approval of the ratepayers at a large public meeting held on the 18th of March, 1870, at which a resolution was passed, "that this meeting approves of the extension and improvement bill promoted by the *West Hartlepool Improvement Commissioners*, now before Parliament, and now explained by them." The Defendants believed that the bill was approved by a majority of the ratepayers.

The bill was read for the first time in the House of Commons on the 10th of February, and for the second time on the 15th of February.

Mr. *Kay*, Q.C., and Mr. *Bagshawe*, for the information:—

We rely upon *Attorney-General* v. *Andrews* (1) and *Attorney-*

(1) 2 Mac. & G. 225.

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General v. *Eastlake* (1), as shewing that, whilst local Commissioners, empowered as these are, might have applied these funds in resisting something (the passing of an Act of Parliament for example), which, if not resisted, would have prevented their carrying their Act into execution, they are not authorized in applying such funds towards the obtaining of a new Act of Parliament.

The VICE-CHANCELLOR called upon

Mr. *Amphlett*, Q.C., and Mr. *W. W. Karslake*, for the Defendants:—

These words, "for promoting the health, comfort, and convenience of the inhabitants," are quite sufficient to authorize the Commissioners in doing what they are doing. No words like them are to be found in either of the cases referred to. The rule in *Bright* v. *North* (2), which was followed in the cases cited, was intended to be applied only to new undertakings. From Lord *Langdale's* remarks in *Attorney-General* v. *Andrews* (3), it follows that, if the obtaining of an Act of Parliament be incident to the objects of the original Act, expenditure such as this will be justified.

Our accounts will have to be audited under the provisions of the *Companies Clauses Act* (8 Vict. c. 16). The 170th section of the *Towns Improvement Clauses Act* (10 & 11 Vict. c. 34) requires that Commissioners shall cause estimates to be prepared before making a rate; and sect. 186 gives to "any person aggrieved" an appeal to the Quarter Sessions. That, then, is the appropriate and adequate tribunal; and this Court will not interfere. If a corporation is about to make a rate for illegal purposes it is not the proper course to apply to this Court: *Attorney-General* v. *Mayor of Wigan* (4).

A liberal construction must be put on these Acts of Parliament.

SIR W. M. JAMES, V.C.:—

I am of opinion that this application is really governed by *Attorney-General* v. *Andrews* (5) and *Attorney-General* v. *Eastlake*. It is impossible, for any effectual purpose, to draw any distinction between those decisions and this case.

(1) 11 Hare, 205. 17 Jur 801
(2) 2 Ph. 216.
(3) 2 Mac. & G. 228, 229.
(4) Kay, 268. 18 L.T. 238
(5) 2 Mac. & G. 225.

Mr. *Amphlett* has pressed upon me the words of this Act of Parliament, "And shall and may do all acts, matters, and things for promoting the health, comfort, and convenience of the inhabitants . . . . and for that purpose may exercise all the powers vested in them by this Act." It appears to me that, supposing this Act had been passed years before those cases were decided, it would be putting a very strained construction upon the words, to say that where trustees are to be surveyors of highways, and "to do all acts, matters, and things for promoting the health, comfort, and convenience of the inhabitants," those words imply that they are to do all acts, matters, and things, including, if necessary, the application to Parliament for an enlargement or alteration of their powers or of the district assigned to them. But this clause must, of course, be now read in the light of those cases which had been decided at the time this Act was passed; and at the time this Act was passed the Legislature, I presume, knew—at least all parties must be supposed to have known—that those cases had decided, as a general rule, that these bodies are not authorized to apply to Parliament for new Acts of Parliament—that is to say, they are not authorized so to apply in the sense of using, for that purpose, the trust funds entrusted to them. If it had been meant, having regard to those decisions, to give such a power, the proper thing would have been to have followed the advice given by the Lord Chancellor, when Vice-Chancellor *Wood*, in *Attorney-General* v. *Eastlake* (1), and to have had those words put into the Act of Parliament, "including, if necessary, the power of applying to Parliament." That was the answer which he gave to an argument of mine, which I thought was a *reductio ad absurdum* of the old authorities; according to which, if there was a slip in the Act of Parliament the trustees could not have gone to Parliament to remedy it.

I am bound now to say, that upon consideration of the cases I entertain no doubt that these decisions are very wholesome; because one cannot but feel that if there were an unlimited power for bodies of this kind to apply, whenever they might think fit, to Parliament at the expense of their constituents, they themselves having determined to do it of their own mere motion, without

(1) 11 Hare, 205.

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calling a general meeting of the ratepayers—I will not say in this particular case, but in some towns—one can easily see there would be a great deal of that class of professional business got up which would be done at the expense of the ratepayers; and it is much better, as it seems to me, that persons who do seek to obtain Parliamentary powers should do so at the risk of satisfying Parliament they are right; and when they satisfy Parliament they are right, Parliament always takes care to provide them with the funds for having done that which is right. Therefore I do not wish to be understood as throwing the slightest doubt upon the propriety of the decisions in these cases if the question had to be determined for the first time.

Mr. *Amphlett* suggested that there are powers here of applying to the Court of Quarter Sessions; and I presume there would be the power of applying to have the rate quashed. I presume they could go to the Court of Queen's Bench by *certiorari*, if necessary, to restrain an illegal act. But the insufficiency of those remedies seems to me to be abundantly demonstrated by what has taken place here; because, although the Commissioners have no power to levy a rate, except for certain purposes which are to be specified beforehand, and although they have made no estimate and no specification of the expenditure which would be incurred in applying to Parliament, some one or other of these persons has been able to incur an expenditure of upwards of £600 for the very purpose of obtaining this Act of Parliament.

It seems to me that shews the necessity of applying to this Court, and of the Court retaining a jurisdiction which, I think, it can quite as satisfactorily exercise as the Court of Quarter Sessions would be able to do. Therefore the injunction will be granted.

The injunction was in the terms "that the Defendants, the *West Hartlepool Improvement Commissioners* and the individual members of such commission and their clerks . . . . be restrained . . . . from applying any moneys heretofore produced or hereafter to be produced by the rates and funds under their control, as such Commissioners, or any of them, in or towards the payment of any costs or expenses heretofore incurred or hereafter to be incurred by

them in or in relation to the preparation, introduction into Parliament, or promotion of the said bill, or otherwise in relation to such bill, or in or towards the payment of any of the costs or expenses of any opponent or late opponent of the said bill, either as an inducement to withdraw such opposition or otherwise, unless and until authorized by Parliament to do so."

Solicitors for the Informants: Messrs *Van Sandau, Cumming, & Sons,* agents for Mr. *Belk, Middlesborough.*

Solicitor for the Defendants: Mr. *Crowdy,* agent for Mr. *W. W. Brunton, West Hartlepool.*

M. R.

1870

April 28, 29.

LEPINE *v.* BEAN.

Will—Construction—Gift to Children—Designatio Personæ—Illegitimate Child.

A testator devised and bequeathed his real and residuary personal estate to trustees, upon trust to permit his wife *M.* to receive the income thereof during her life, provided she should so long continue his widow and unmarried; and from and after her death or second marriage, upon trust to pay and divide the said estate unto and equally between and amongst all and every his children, if more than one, in equal shares as tenants in common, and in case there should be but one such child, then the whole to go to such child. The testator had married a wife, *E.*, but had had no children by her, and had lived apart from her for many years. At the date of the will she was of the age of seventy years, and she survived the testator. The testator had, for some years previously to the date of the will, cohabited with *M.*, who bore his name, and was always recognized by him as his wife. The testator had by *M.* four children, of whom two had died before the date of the will; one was then alive, and the fourth was afterwards born. These children were all entered in the baptismal registry in the name of the testator, and were known by his name:—

Held, that *M.* was entitled to the income of the real and personal estate of the testator for her life so long as she should continue unmarried, and that after her death such estate would devolve on the child of the testator and *M.* who was living at the date of the will.

WILLIAM BEAN, by his will, dated the 5th of May, 1868, after expressing his desire to be buried at *Kingsworth*, directed his trustees to cause to be placed on his grave a head and foot stone similar to those on the grave of his father, and he also directed his "dear wife *Margaret Bean*" to keep up and preserve his grave. The testator bequeathed to his "said wife *Margaret Bean*" his household furniture and other effects, and a legacy of £10; and he devised and bequeathed all his real estate and the residue of his personal estate to trustees, upon trust to pay certain legacies, and subject thereto upon the following trusts: "Upon further trust to permit my said wife, *Margaret Bean*, to receive the rents, interests, dividends, and annual income of my said real and personal estate for and during the term of her natural life (provided she shall so long continue my widow and unmarried), she thereout maintaining and educating my children, and keeping all the buildings in good tenantable repair, and insured against loss or damage by fire; and from and immediately after the decease or

second marriage of my said wife, whichever event shall first happen, then upon further trust to pay and divide the whole of the residue of my said real and personal property, subject as aforesaid, unto and equally between and amongst all and every my children, if more than one, in equal shares as tenants in common, and not as joint tenants; and in case there shall be but one such child, then the whole to go to such child. And in case all my said children shall die in the lifetime of my said wife without leaving issue," upon trusts for the benefit of the children of the testator's brother, *John Bean*, and the children of *Elizabeth Dury*, whom he described as his niece. The testator died on the 9th of July, 1869. While a bachelor he had intermarried with *Elizabeth Bean*, but at the date of his will he was living apart from her, and had been so living ever since 1843. He never had any children by her, and at the date of the will she was upwards of seventy years of age. She survived the testator, and was made a Defendant to the suit. From the year 1861 down to the time of his death the testator lived with one *Margaret Bishop*, otherwise *Bean*, as his wife; and during the whole of that period she was recognized by the testator as his wife, and had borne his name. The testator had by her four children, of whom two had died before the date of his will: one, the Defendant *Louisa Bean*, was then alive, and the fourth was afterwards born. All these children were baptized as the children of the testator and *Margaret* his wife, and were always known by the name of *Bean*.

The bill was filed by the trustees of the testator's will against *Margaret Bean* and her two children, *Elizabeth Bean*, and the next of kin of the testator (including the children of *John Bean* named in the will), and the object of the suit was to obtain a declaration as to the rights of the persons interested in the testator's estate.

Elizabeth Dury was an illegitimate child of a sister of the testator; her children were resident in *New Zealand*, and were not made parties, their interest being identical with that of the children of *John Bean*.

Mr. *G. N. Colt*, for the Plaintiffs.

Mr. *A. E. Miller*, for *Margaret Bishop* (or *Bean*) and her two children, submitted that they were entitled to the real and residuary

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personal estate of the testator. The case was governed by that of *Wilkinson* v. *Adam* (1). It could not now be argued, as it might have been previously to the passing of the *Wills Act*, that the testator contemplated surviving his wife and marrying *Margaret Bean*. Under the old law, a will making provision for the children of a future marriage would not have been revoked by such future marriage and the birth of a child: *Kenebel* v. *Scrafton* (2); but by the *Wills Act*, sect. 18, every will is now revoked by the marriage of the person making it.

Mr. *Vaughan Hawkins*, for the other Defendants, said that two of them were infants, but that the others were desirous that, so far as was possible, all questions arising on the will should be now decided. He contended, in the first place, that *Margaret Bean* could not take, as the gift was to be so long as she was the testator's widow, and not having been married to the testator she could not be his widow.

[The MASTER OF THE ROLLS:—He meant her to take so long as she was unmarried.]

Mr. *Hawkins*:—Then, with respect to the children. The gift is to a class of children. Future children clearly cannot take: *Pratt* v. *Mathew* (3). There was only one child of *Margaret Bean* living at the date of the will; consequently there is no sufficient *designatio personæ* to enable the illegitimate children to take. Besides, the testator was married, and in the contemplation of the law might have had children; if he had any, they would clearly have taken to the exclusion of the illegitimate children.

LORD ROMILLY, M.R.:—

I think the illegitimate child takes in this case. I think there is a sufficient designation of the children in this case, and it is merely a question of designation. I may put this as an instance of what I mean: Supposing a bachelor, living alone, takes the children of a friend to live with him, and always calls them his children, and then leaves a will, and says, "I leave such-and-such property to my children"—that is a sufficient designation. I am

(1) 1 V. & B. 422. (2) 2 East, 530. (3) 22 Beav. 328.

of opinion that, in that case, parol evidence would be admitted for the purpose of shewing that he always called them his children; and that, although everybody knew that they were not his children, he nevertheless thought fit to call them so. It would be a very different thing if he married afterwards and had children. Then there might be a question whether the class included those then alive. The illegitimate children stand in no different situation. Here was a man living with a lady, whom he called his wife, whom everybody believed to be his wife, and who passed by his name. The clergyman of the parish seems to have thought that she was his wife, and he baptized the children as the children of this man and his wife in the ordinary form. Obviously everybody supposed that they were his children. He calls her his wife all through the will, and he also calls the children "my children." I think it is pretty clear that by these words he meant his children by the woman he called his wife. It is true he intended afterborn children to be included, but the law will not allow a gift to be made to afterborn illegitimate children. There might, unquestionably, be legitimate children afterwards born, without referring to the legal idea that a woman of the age of seventy might have children; yet she might die, and he might marry a young woman, and have children. Therefore, I do not think it is necessary to exclude that argument from the case. But, in my opinion, that case is sufficient to shew that there cannot be included in the class of persons whom he calls his children any future illegitimate children. It is clear that he describes a class as "his children." But what appears to be clear is this: he had had two children who had died; he had one child who was alive; and he had afterwards another. Those children who had died he called his children. And the words of the will are so strong that it is obvious that, by "my wife" he meant *Margaret Bishop*, and that by "my children" he meant the children he had had by her. I think that is plain upon the will. I think the designation of the wife is quite clear and distinct. He calls her his wife, and the children his children. I think, thereupon, those who were alive were entitled to take. I do not think that using the word in the plural would exclude them, because it was quite clear that it was the designation of this one and some others —a designation intended to include others who could not be in-

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cluded. But it is a clear designation of this one. Therefore I am of opinion that the illegitimate child takes, and I make that declaration.

Mr. *Hawkins*:—As your Lordship holds that the other child cannot take, there will be an intestacy as to a moiety.

The MASTER OF THE ROLLS:—No; this child takes the whole. If a person gives his property to his children, and he has only one child, that child takes the whole. I daresay the testator intended that afterborn children by this woman should take; but in contemplation of the law he had none. According to law, an illegitimate child is not the child of any father, and accordingly the testator had no child afterwards born. If he had had legitimate children, they would have taken under the term "children." The only question is, whether the word "children" is a sufficient designation of a girl of the name of *Louisa Bean*, and I am of opinion that it is so. It is a question on the construction of the will. That child unquestionably takes the whole, if I am right; if not, the child takes nothing.

MINUTES:—Declare that, according to the true construction of the will of the said *William Bean*, the testator, the Defendant *Margaret Bean*, otherwise *Bishop*, is entitled to the specific and pecuniary legacies bequeathed by the said will to her under the name and description of the testator's wife, *Margaret Bean*. And it is declared that the said Defendant, *Margaret Bean*, otherwise *Bishop*, is also entitled to receive during her life, or until she shall marry, the money and the rents, interest, dividends, and annual income of the said testator's real and residuary personal estate, she thereout maintaining and educating the Defendant, *Louisa Bean*, and keeping all the buildings in good and tenantable repair, and insured against loss or damage by fire. And it is further declared that, according to the true construction of the said will, under the provision therein contained that after the death or marriage of the Defendant, *Margaret Bean*, otherwise *Bishop*, his residuary property is to be held in trust, to pay and divide the same unto and equally between all and every his children, if more than one, in equal shares as tenants in common, and not as joint tenants, and in case there should be but one such child, then the whole to go to such child, the said Defendant, *Louisa Bean*, is the person intended by the said bequest.

Solicitors: Messrs. *Duncan & Murton*, agents for Messrs. *Furley, Hallett, & Creery, Ashford.*

In re STREET.

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Solicitor—Taxation of Costs—Payment—Retention of Costs by Solicitor before delivering Bill—6 & 7 Vict. c. 73, s. 41.

A solicitor retained the amount of his bill of costs out of money in his hands belonging to the client, and the client, on receiving the balance of the money, but before the bill of costs had been delivered, signed an account in which the total amount of the costs was an item, and gave a receipt for the balance:—

Held, that there had been no payment of the bill within the meaning of 6 & 7 Vict. c. 73, s. 41; and that the client was entitled to have the bill taxed more than a year after the retainer of the costs and the signature of the account:

Held, also, that a special application was necessary under the circumstances.

THIS was a summons, adjourned from Chambers, for the taxation of three bills of costs of Mr. *W. J. Street*, in relation to the sale of three estates sold by him as a trustee under a trust-deed, which provided that he might act as solicitor in the matter, and be paid for business done by him, as if he were not a trustee.

The sales of the estates were completed in August, 1867, September, 1868, and July, 1869, respectively; in each case the purchase-money was received by *Street*, who retained out of it the amount of his bill of costs, and paid the balance to the *cestuis que trust*. About a month after the completion of each sale, *Street* sent to each of the *cestuis que trust* an account shewing the receipts and payments of the trustees relating to each sale, in which the total amount of the bill of costs was entered under the head of "vendors' costs, charges, and expenses in effecting the sale of the estate." All of the *cestuis que trust* signed the accounts, and gave receipts for their shares of the purchase-money.

The bill of costs in relation to the second sale was delivered to the present applicants, who were two of the *cestuis que trust*, on the 30th of December, 1868; and the bills of costs in relation to the first and third sales were delivered to the solicitors of the applicants on the 25th of February, 1869, and the 18th of August, 1869, respectively.

The summons was taken out on the 10th of January, 1870.

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A clerk of the applicants' solicitors made an affidavit in support of the summons, stating that each of the bills contained a great number of items of overcharge, and specifying items of alleged overcharge in the first and second bills.

The applicants, before taking out the summons, had applied for the common order; but the Secretary at the Rolls considered that, as the costs had been retained by the solicitor, it was a case for a special application.

Mr. *Rasch*, for the Applicants:—

The taxation of these bills is resisted on the ground that they have been paid, and that two of them were paid more than twelve months before this application was made. But the retention by the solicitor, out of money for which he has to account to his client, of the amount of his bill of costs, is not payment within the meaning of the 41st section of the Act 6 & 7 Vict. c. 73: *In re Bignold* (1); *Ex parte Shackell* (2); *In re Forsyth* (3); *In re Pugh* (4). It is said that there has been a settlement of accounts, but the accounts only contained the total amounts of the bills, which were not delivered until long afterwards. It will be objected, that the bill of costs in relation to the second sale was delivered rather more than a year before this application; but the sale of the three estates must be treated as one transaction, and the three bills must be treated as one, so that there was no delivery of a complete bill until August, 1869. Moreover, the overcharges are such as to amount to special circumstances justifying taxation more than twelve months after the delivery of the bills.

[He referred to *In re Harper and Jones* (5); and as to some of the items of alleged overcharge, to *In re Pender* (6), and *Rumsey* v. *Rumsey* (7).]

Mr. *Speed*, for the Respondent:—

All the bills have been paid, and two of them were paid more than twelve months before this application. Retention of the

(1) 9 Beav. 269.
(2) 2 D. M. & G. 842, 849.
(3) 34 Beav. 140.
(4) 32 Beav. 173; 1 D. J. & S. 673.
(5) 10 Beav. 284.
(6) Ibid. 390.
(7) 21 Beav. 40.

costs by the solicitor, followed by a settlement of accounts, is payment within the Act: *Ex parte Hemming* (1). In that case, as here, the bill was not delivered until after the settlement of the account. Moreover, one of the bills was delivered more than a year before this application; and there is no allegation of pressure, or of gross overcharge amounting to fraud. As to the third bill, payment, though within twelve months, is a bar to taxation, in the absence of special circumstances. If the applicants are right, they might have obtained the common order, and must pay the costs of the special application.

LORD ROMILLY, M.R.:—

I am of opinion that the applicants are entitled to have all these bills taxed. I have held over and over again that there can be no payment, within the meaning of the 41st section of the Act, before the bill has been delivered, and before the client has had the opportunity of seeing the items. If a solicitor sells an estate, receives the purchase-money, deducts the amount of his costs, and pays the balance to the client, that is not payment within the 41st section, if he has not delivered his bill of costs.

With regard to the objection that one of the bills was delivered more than twelve months before this application was made, I think that the clients are entitled to treat all the bills as relating to one transaction, and to refuse to settle one without having the others.

I have looked at the bills, and I think that some of the items of alleged overcharge are serious, though I express no opinion upon them, as that is a question for the Taxing Master.

I am clearly of opinion that, after the retention of the costs by the solicitor, and the lapse of time which has occurred, the applicants could not have obtained the common order.

The bills must be referred for taxation, and the costs of this application will be part of the costs of taxation.

Solicitors for the Applicants: Messrs. *Tanqueray-Willaume, Hanbury, & Tanqueray-Willaume.*

Solicitor for the Respondent: Mr. *Rae.*

(1) 28 L. T. (O.S.) 144.

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May 31.

GASLIGHT IMPROVEMENT COMPANY *v.* TERRELL.

Company—Winding-up—Security given to Director—Undue Preference—Companies Act, 1862, *s.* 164—*Duty of Director.*

A security given by an insolvent company for payment of a debt due to a director cognisant of the state of the company's affairs, may be set aside as an undue preference under sect. 164 of the *Companies Act*, 1862, even although the director may have pressed for payment of his debt.

A director desiring to obtain payment of his debt under such circumstances ought to resign his office before applying to the company for payment.

A bill to set aside such a security may be filed in the name of the company as Plaintiff.

Post 317, 9 Ch. D. 324, 325-7

THIS was a suit by the *Gaslight Improvement Company* (now in liquidation), for the purpose of setting aside a security given by the company to the Defendants, as being an undue and fraudulent preference over the general creditors of the company.

The company was registered on the 12th of October, 1864. The original capital was £4000, divided into eighty shares of £50 each, of which sixty were allotted as fully paid-up to the proprietors of certain patents purchased by the company. Subsequently, in April, 1865, a special resolution was passed, that the capital of the company be increased to £8000 by the creation of 400 new shares of £10 each; and in August, 1865, a special resolution was passed, that the capital be further increased by the issue of 400 preference shares of £10 each, bearing interest at the discretion of the directors, but not to exceed 15 per cent.

By clause 44 of the articles of association, the directors were empowered to charge, mortgage, or hypothecate the property for the time being of the company, or any part thereof, whether real or personal, moveable or immoveable, or in possession or in action, for securing payment of any debt which might be from time to time owing by the company, whether the time or term of credit had expired or not.

By clause 65, the directors were empowered to borrow such sums as a general meeting might authorize, upon such terms as a general meeting might prescribe, and so far as not prescribed, and

subject to any directions given by a general meeting, as the directors might think expedient.

On the 6th of December, 1865, a loan of £800 was made to the company by *Hull Terrell* and *Alfred Rouse Dunn*, two of the directors of the company; and it was resolved, at a board-meeting held on that day, that this sum should be repaid by instalments, at intervals of six months, and should bear interest at the same rate as the preference shares. The sum so lent by *Terrell* and *Dunn* was borrowed by them from the *Protector Life Assurance Company*, on the security of a joint and several bond, dated the 28th of November, 1865, and executed by *R. J. B. Beeton*, the then secretary of the company, as principal, and *Terrell* and *Dunn*, and *William Fauntleroy Street* (also a director of the company), as sureties.

On the 12th of December, 1866, a resolution was passed by the board of directors, that as there were pressing claims on the company to the amount of £500, this sum should be borrowed for three months on the joint security of the directors. Accordingly, a sum of £500 was borrowed from the *British Mutual Investment Company*, on the security of a joint and several promissory note of *Alfred Rouse Dunn*, *Hull Terrell*, *George Thomas Smith*, and *William Moore* (all of whom were then directors of the company), for £518 15*s.*, in favour of the *British Mutual Company*, to become due on the 30th of March, 1867.

At an extraordinary general meeting held on the 23rd of January, 1867, the directors were thanked for having largely and personally assisted the finances of the company when its funds were inadequate to its requirements, but were requested not to borrow any further sums of money without previously submitting to the shareholders the terms of the proposed loan. At an adjourned meeting, held on the 26th of February, 1867, they were authorized to borrow £600 in addition to the loans already contracted; and on the 29th of February, 1867, the company borrowed £400 of the *British Mutual Investment Company*, on the security of a joint and several promissory note by *Alfred Rouse Dunn*, *Hull Terrell*, and *George Thomas Smith*, payable on the 16th of August, 1867.

In November, 1866, Dr. *Edward Bishop*, on a representation by

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the secretary that the company was in a flourishing condition, applied for and obtained an allotment of ten £10 shares in the company, and gave his acceptance for £50 and interest payable three months after date, being £5 on each share of the company. Afterwards, discovering that the representation made to him was incorrect, he repudiated the shares, and an arrangement was made between him and the company, and sanctioned at the general meeting of February, 1867, that the ten shares taken by him should be cancelled, and that the £50 for which he had given his acceptance should remain as a loan to the company for twelve months, and carry interest at 7½ per cent. Accordingly, *Bishop* paid his acceptance at maturity, and on the 19th of February, 1867, a bill for £50 12*s.* 6*d.*, payable on demand with interest at 7½ per cent., was drawn by the company in his favour, he undertaking by letter not to present it for payment for twelve months, unless the company should be wound up or wish to pay off its loans. About the same time, *Bishop* took a transfer of two of the fully-paid-up £50 shares of the company, and became a director.

All this time the company had been in pecuniary difficulties. When the promissory note for £518 15*s.* given to the *British Mutual Investment Company* became due, on the 31st of March, 1867, the *Investment Company* declined to renew it.

In May, 1867, one *Bower*, a creditor of the company, commenced an action to recover the sum of £112 6*s.* 6*d.*; and on the 4th of July the company by arrangement gave judgment in the action, upon the understanding that execution should not be issued until after the 15th of July.

On the 17th of July a board-meeting was held, at which *Terrell*, *Dunn*, *Smith*, and (during the earlier part of the time) *Bishop* were present, when it was resolved that a call should be made of £4 per share, payable immediately; and a resolution was also passed by which, after reciting the liabilities incurred by *Dunn*, *Terrell*, *Smith*, *Moore*, and *Beeton*, on behalf of the company, and also the loan of £50 to the company by *Bishop*, and that it was desirable that the parties who had so become liable for the benefit of the company should have some security from the company for the sums due from the company to them, it was resolved (amongst other things) that a mortgage be made by the company to a trustee

of the call made that day, and any calls which had been made and had not yet been paid, and of all the other property of the company; the trustee to collect and recover the same, and discharge the debts for the company upon which the said parties were liable, and also the debt due to Dr. *Bishop;* that the trustee be *Henry Wicking Miles,* and that the secretary be authorized to set the seal of the company to the mortgage when made.

In pursuance of this last resolution, the deed now sought to be set aside was prepared in the office of Messrs. *Terrell & Chamberlain,* the solicitors of the company, and was afterwards executed. It bore date the 25th of July, 1867, and was expressed to be made between the company of the first part; *Alfred Rouse Dunn, William Fauntleroy Street,* and *Robert John Barton Beeton,* of the second part; *Alfred Rouse Dunn, Hull Terrell, George Thomas Smith,* and *Henry William Moore,* of the third part; *Alfred Rouse Dunn, Hull Terrell,* and *George Thomas Smith,* of the fourth part; *Edward Bishop* of the fifth part, and *Henry Wicking Miles* of the sixth part; and contained an assignment by the company to *Miles* of the furniture and effects belonging to the company, and then being, or which should thereafter be, in or upon the registered office of the company, and all and singular the letters-patent and stock-in-trade of the company, and all and singular the principal and interest moneys due and owing to the company, and specified in the first schedule thereto, and all securities for the same, and all and singular the moneys due and owing to the company from the persons whose names were specified in the second schedule thereto in respect of unpaid calls, and also all and singular other the property then belonging, or which should for the time being belong, to the company, both real and personal, immoveable and moveable, in possession or in action, upon certain trusts for securing payment of the debts in respect of which the parties thereto of the second, third, and fourth parts, had become liable, and also the debt due to *Bishop.* The first schedule contained a list of persons indebted to the company, and the amounts of their debts; the second schedule contained a list of shareholders (including *Terrell, Dunn, Moore,* and *Smith*), and sums due from them in respect of calls.

On the 19th of July, Messrs. *Terrell & Chamberlain,* who had

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acted as attorneys for the company in the action brought by *Bower*, wrote to *Bower's* attorneys as follows:—"We are sorry to say that we are not prepared with a cheque for the amount due to your client. You will be paid if you do not press. The full amount has been called up upon the shares, and if paid you will get the money very soon; if not, you must wait awhile, as there is nothing to liquidate, and there would be no reason for obtaining an order to wind up the company. We were led by the secretary to believe that the money would be forthcoming on the 15th instant."

On the 23rd of July *Bower* issued a writ of *fi. fa.* against the company. On the 30th of July the sheriff made a return to the writ of *nulla bona*. On the 31st of July *Bower* presented a Petition for winding up the company; and on the 9th of November the Court made an order of winding-up on *Bower's* Petition.

Notwithstanding the pendency of the Petition for winding-up, the property of the company was, to a considerable amount, got in and dealt with under the provisions of the deed of the 25th of July, 1867. *Miles*, the trustee of the deed, took very little part in carrying it into effect, but with the consent of *Terrell*, *Dunn*, and *Smith*, left the property therein comprised to be managed and dealt with by *Charles Beckwith*, the secretary of the company.

In May, 1868, *Dunn* was adjudicated a bankrupt, and *Charles Wyndham Kingdom* was appointed his assignee.

In October, 1868, the bill in this suit was filed, and was afterwards amended, and as amended was against *Terrell*, *Smith*, *Bishop*, *Beckwith*, *Kingdom*, and *Miles*, as Defendants; and it prayed that the indenture of the 25th of July, 1867, might be set aside; that it might be declared that the Defendants *Terrell*, *Smith*, *Beckwith*, and *Miles*, and the Defendant *Kingdom*, as the assignee in bankruptcy of *Dunn* and out of his estate, were jointly and severally liable to make good the assets of the company collected or received under or by virtue of the indenture with interest thereon, and all loss occasioned to the company by the execution of the indenture, and for consequential relief. *Beeton*, *Street*, and *Moore* claimed no interest under the deed; *Bishop*, although he had claimed under it, put in a disclaimer, and was dismissed from the suit previously to the hearing.

It appeared that the Defendant *Terrell* had been a member of the firm of *Terrell & Chamberlain*, the solicitors to the company; and though he had ceased to be such previously to July, 1867, he was at that time and afterwards permitted by the firm to occupy part of their office, and to avail himself of the services of their clerks. The Defendant *Miles* was a clerk in the firm of *Terrell & Chamberlain*.

It also appeared that the deed of the 25th of July, 1867, was settled by the late Mr. *Ebenezer Charles*, who, in an opinion written at the end of the draft, and dated the 23rd of July, 1867, called attention to various cases as authorities against the power of the directors to mortgage future calls; and added, "This is independent of any other objection which, in the case of winding-up, the general creditors of the company might succeed in raising to the security as being a preference given by the directors to themselves out of the assets."

Terrell, by his answer, stated that at the board-meeting of the 17th of July, 1867, *Dunn* insisted on having security in respect of his liabilities for the company.

Mr. *Jessel*, Q.C., and Mr. *Bagshawe*, for the Plaintiffs, submitted that at the time when the security was given it was quite clear that the company was insolvent, and that the directors knew it, and that, consequently, the security was void under sect. 164 of the *Companies Act*, 1862.

Sir *R. Baggallay*, Q.C., and Mr. *Hemming*, for the Defendants *Terrell*, *Beckwith*, and *Miles*; and Mr. *Southgate*, Q.C., and Mr. *Finch*, for the Defendant *Smith*:—

The company is not the proper Plaintiff in a suit of this kind. By the 164th section of the *Companies Act*, 1862, a deed which, if executed by an individual trader, would, in the event of his bankruptcy, be deemed to have been made by way of undue or fraudulent preference, is to be invalid when executed by a company which is afterwards wound up. Deeds executed by a company by way of fraudulent preference are, therefore, to be dealt with in the same way as deeds executed by individual traders; and it is quite clear that the trader could not come and have his own deed set aside.

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The creditors of the company ought themselves to be Plaintiffs; or else the official liquidator, as representing them, ought to have been Plaintiff. It is not even proved that the estate will be insufficient to pay the debts of the company.

But we say that this is not a case of fraudulent preference. Where a debtor, on the eve of bankruptcy, voluntarily selects from the general body of his creditors one or two creditors for the purpose of preferring them, he is said to have made a fraudulent preference; but that does not apply where a demand for payment is previously made. Here it appears, by the resolutions passed on the 17th of July, 1867, and by the answer of *Terrell*, that some, at least, of the persons entitled to the benefit of this deed insisted on having security from the company.

Mr. *C. M. Roupell*, for *Kingdom*.

LORD ROMILLY, M.R.:—

I think this is a very clear case. The company was established in October, 1864. The directors borrowed money perfectly *bonâ fide* for the sake of the company; and as the persons who lent them money would not lend it to the company without the security of the directors, the consequence was that the directors, acting perfectly *bonâ fide*, became the creditors of the company. In that state of things an action is brought against the company by a person of the name of *Bower*, in May, 1867, and the solicitors for the company offer a judgment, provided the execution is not issued before the 16th of July. This is accepted, and thereupon the pleas in the action are withdrawn, and judgment is signed on the 4th of July. On the 15th of July *Bower* did not get the money. On the 17th of July a meeting of the directors takes place, and there is a resolution of the directors to make a call, and to make also an assignment of all the property of the company in favour of the directors who were creditors of the company. This is very clearly expressed in the letter of the 19th of July, 1867. That assignment to the directors is sent to a gentleman at the bar to settle. He settles the draft, states upon the back of it, that it is also liable to this objection, that it may be treated as an undue preference. Notwithstanding that they engross and execute the deed. A *fi. fa.*

is issued on the very day that Mr. *Charles* wrote his opinion; and two days after, the deed having been engrossed, a conveyance is made to Mr. *Miles* on behalf of five directors, of every particle of the property they held, including a trust to get in outstanding property and enforce the payment of all calls due to the company. The return to the *fi. fa.*, five days afterwards, is *nulla bona*, and a day or two after a Petition is presented to wind up. The order was made on the 9th of November, but the winding-up dates from the 31st of July.

On that state of facts, without referring more to the evidence, I think it is quite clear the directors knew that the company was in a state of insolvency—that it could not avoid being wound up. I assume that the company is not now able to pay its creditors in full; but if Sir *Richard Baggallay* or Mr. *Southgate* wish to contest that point, I will have the official liquidator put into the box and examined. I am of opinion, on the evidence, that the directors were aware that the company was insolvent at the time that this deed was executed. Then the question is whether clause 164 of the *Companies Act* applies. It is this: "Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company." Then, what are the facts? The directors of the company think fit to pay themselves. It is to be observed that the directors of every company who are also creditors fill two distinct and antagonistic characters. In the first place, they are trustees for the benefit of the company, and are trustees for the creditors to this extent, that they are bound to apply all the assets for the benefit of the creditors as far as they will extend. They themselves are also creditors, and have an interest to have their own debts paid. Now, if they had themselves passed a resolution, such as that of the 17th of July, 1867, to pay *A. B.*, who was not a director, but a stranger to the company, nobody, in my

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opinion, would be found to assert that that was not a fraudulent preference, the creditor having done nothing, having made no application for payment. Is the case altered by the fact that the creditor is one of the directors? So far from that being the case, in my opinion it only adds a breach of trust to the fraudulent preference. It is distinctly an improper act on the part of the director to direct the money to be paid to a stranger, but to direct it to be paid to himself for his own benefit is still worse: there is a taint of fraud which is introduced in it, while in the other case it is only a matter of undue preference. Suppose that the director had been the partner of a creditor who required to be paid, and he got the benefit of the payment through his partner, would anybody doubt that there was a tincture of fraud in his getting this benefit by means of undue preference? It is the directors who make the order for payment. I am of opinion that this fact only makes the case worse, and compels this Court to direct the whole transaction to be set aside. This deed, therefore, cannot be supported.

The fact that the company is suing merely raises this question, whether the company is insolvent or not? If the company is not insolvent, the question does not arise; and if it be insolvent, then I am of opinion that this deed is a fraudulent preference, that it is a fraud, and must so be decided to be; and that the directors themselves must be ordered to refund any money which they have received for their own benefit in this transaction, always allowing them to prove for their own debts, and come in with the other creditors *pari passu*, and also allowing them in their accounts any money properly paid for the benefit of the company.

With reference to what was said to me about pressure, I wish to say I do not think that a director, while he holds his office as director, can properly exercise pressure. Whom is he to press? Here are five directors, all of whom are creditors; against whom is the pressure to be directed? The only answer is, themselves; that is, they are to press themselves to pay themselves. The matter does not admit of being stated. The only way in which a director can exercise pressure is by ceasing to be a director, and then, when he has done that, he may require the directors to pay his money, and press them to do so.

Sir *Richard Baggallay* and Mr. *Southgate* declined to examine the official liquidator, and a decree was made setting aside the deed.

Solicitors for the Plaintiff: Messrs. *Palmer, Eland, & Nettleship.*
Solicitors for the Defendants: Messrs. *Terrell & Chamberlain;* Mr. *Durant:* Messrs. *T. White & Sons.*

V.-C. J.
1870
March 28;
April 21,
22, 26.

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Legacy Duty—Partnership Property.

Legacy duty is payable upon the share of a deceased partner, a domiciled Englishman, in the proceeds of freehold property in *Bombay* used for the purposes of the partnership, and forming a partnership asset.

15 Eq 405.
9 Ex 33-4
6 TD 23
10 QBD
474-5-7

THIS was a Petition raising the question whether legacy duty was payable under the will of the testator, Sir *Charles Forbes* (who was domiciled in *England* at his death), on his share in the proceeds of real estate in *Bombay*, which was sold after his death, and had belonged to a partnership there carried on of which he was a member.

For many years before his death, in 1849, Sir *Charles Forbes* was the head of the partnership firm, at *Bombay*, of *Forbes & Co.*, merchants and agents. Each partnership was for one year only, commencing on the 1st of August, and terminating on the 31st of July. In October, 1829, the firm, which then consisted of Sir *C. Forbes*, *John Stewart*, and *James Forbes*, purchased the premises on which the business was carried on, from the representatives of *Hormanjee Bomanjee*, for 200,000 rupees; and by an indenture dated the 31st of October, 1829, the office premises, dwelling-house, and godowns were conveyed unto and to the use of Sir *C. Forbes*, *John Stewart*, and *James Forbes*, their heirs and assigns. On the purchase being made, an account was opened in the books of the firm, entitled "Office premises, dwelling-house, and godowns;' and this account was debited, and the account of *Hormanjee Bomanjee* was credited, with the 200,000 rupees purchase-money. The account was annually credited with a nominal rent of 1000 rupees, and debited with interest on the amount at the debit of the account, and also with the expense of repairs and other outlay; and in the opening entries in the books of each new partnership the "Office premises, dwelling-house, and godowns" were taken over as an asset by the new partnership—a new account of the same title being opened in their books, to which the balance at the debit

of the old account was transferred; the commencing partnership thus, in fact, always purchasing the office premises, &c., from the expiring partnership, for the sum at which the premises stood in the books of the expiring firm.

Sir *Charles Forbes* died on the 20th of November, 1849, and the partnership, during the year commencing the 1st of August, 1849, consisted of himself and *Roderick Mackenzie*, their interests being in the proportion of three-fourths to one-fourth.

Of the three persons to whom, as joint tenants, the business premises were conveyed on the 31st of October, 1829, *John Stewart* was the survivor; and the legal estate was, by deed of the 10th of May, 1853, conveyed by him to the executors of Sir *C. Forbes*.

By his will, dated the 18th of May, 1849, Sir *C. Forbes* gave the residue of his personal estate and property to be divided in fifths between his grandchildren (children of his deceased son *John*), and his four children; and after appointing his three sons (*Charles*, *George*, and *James Stewart Forbes*) his executors, he also appointed the several partners of the firm of *Forbes & Co.* of *Bombay*, who might be residing at *Bombay* at the time of his death, executors of his will, for the purpose of realizing his personal estate, including his dwelling-house and premises in *Forbes Street*, *Bombay*, and remitting the same to his executors in *England*.

After the death of Sir *Charles Forbes*, the business of the firm was carried on at *Bombay* by *Roderick Mackenzie* by himself and with partners, and, as before, the firm continued to be charged with the rent of 1000 rupees per month for office premises.

Mackenzie died in 1858, and after his death, and until their sale in 1864, the office premises continued to be occupied, and the account was kept as before.

The suits of *Forbes* v. *Steven* and *Mackenzie* v. *Forbes* were instituted for the purpose of winding up the affairs of the partnership, and determining certain questions as to the rights of the executors of Sir *C. Forbes* and *R. Mackenzie* in the office premises, and in other assets of the firm; and, in particular, whether, by agreement subsequent to the death of Sir *C. Forbes*, the respective proportions of Sir *C. Forbes* and *Mackenzie* in the partnership property had been altered from 3 and 1 to 2 and 2.

Pursuant to an order of the 2nd of July, 1864, the land, mes-

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suage, offices, and premises at *Bombay* comprised in the purchase-deed of October, 1829, and then in the occupation of *Forbes & Co.* of *Bombay*, were, in October, 1864, sold for the sum of £85,000, which money had been paid into the bank to the credit of the cause, and was now represented by a sum of £97,382 11*s.* 3*d.*, bank £3 per cent. annuities.

By the decree, dated the 4th of May, 1867, it was declared that the "office premises, dwelling-house, and godowns," formerly belonging to the partnership firm, formed part of the assets of the firm as it was constituted at the death of Sir *C. Forbes* in November 1849, and that Sir *C. Forbes* was entitled to three-fourths thereof, and of the profits arising from the sale, and *R. Mackenzie* to one-fourth, according to their respective shares and interests in the partnership, but subject to provision made for the copartnership debts, including the balances due to the estates of Sir *C. Forbes* and *Mackenzie* respectively on their respective accounts with the partnership; and a transfer out of the funds standing to the account "The proceeds of sale of the office premises, dwelling-house, and godowns," was ordered to be made to the account of the executors of Sir *C. Forbes* and to that of the executor of *Mackenzie* in the above proportions. From this decision there was an appeal, but the appeal was compromised under an arrangement by which the claim of *Mackenzie's* representatives to a moiety of the profits of the sale, instead of a fourth, was compromised for the sum of £3375, which was contributed by three of the beneficiaries under Sir *C. Forbes'* will.

The solicitor of the Inland Revenue having claimed that the proceeds of the sale of the office premises were liable to legacy duty, as arising from property impressed by the partnership contract with the character of personal estate, and devolving in that character to the legatees of the deceased partners, this Petition was presented by the executors of Sir *C. Forbes* and of *Mackenzie*, for the purpose of carrying out the transfer directed by the Court, without the fund being subjected to any deduction for legacy duty.

Mr. *Kay*, Q.C., for the representatives of Sir *Charles Forbes*:—

Legacy duty is not payable upon this property, which was real estate unconverted at the death of Sir *C. Forbes*. *Custance* v.

Bradshaw (1) shews that the share of a deceased partner residing in *England*, in the freehold and copyhold estate of the partnership, is not personal estate so as to be subject to probate duty, and, *à fortiori*, a share in the real estate of a partnership situated abroad is not personal estate. Vice-Chancellor *Wigram* there says (2): "Again, admitting that if the estate directed to be converted were unsold at the death of the testator, the surplus proceeds of the estate would belong to the same persons to whom the personal estate of the testator would go, yet they might pay off the debts and elect to take the land discharged of the trust to sell. If they should so act and elect, could the Crown insist upon the land being sold in respect of any interest it had in ascertaining the actual amount of probate duty payable in respect of the land?—for to that length the argument for the Crown must go. In the simple case I have put, of land directed to be converted into money, I think the answer to the claim of the Crown would be that the property in question was real estate at the death of the testator, and, as such, not liable to probate duty; and that equity would not alter the nature of the property for the purpose only of subjecting it to fiscal claims, to which, at law, it was not liable in its existing state."

Every word of this applies just as much to legacy duty as to probate duty. *Matson* v. *Swift* (3) is to the same effect. The testator there, so far as he could, converted that which was not actually sold in his lifetime into personal estate; and Lord *Langdale*, in language almost identical with that used by Vice-Chancellor *Wigram* in *Custance* v. *Bradshaw*, decided against the claim of the Crown to probate duty. In this case the will contains no trust for sale. There is a general bequest of residue without reference to the particular property, or to any property, so that the nature of the property was not changed at the death of the testator. There it was, in the same state in which the testator himself had it. The fiction by which in equity it is treated as personal property is only a fiction for the purposes of distribution, and for no other purpose; and even if he had impressed it with a binding trust for sale, by some document other than his will, the result would be the same for the purpose of imposing duty upon it, and it would not be charged.

(1) 4 Hare, 315. (2) 4 Hare, 324. (3) 8 Beav. 368.

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So in the case of a partnership, the rule by which, for the purpose of distribution, it is treated as being personal estate being an equitable rule only, and there being no kind of equity in favour of the Crown to change the nature of the property so as to impose duty upon it, we submit that the Crown must look at the property as it existed at the death of the testator, and cannot avail itself of that peculiar equity for the purpose of distribution. *Attorney-General* v. *Brunning* (1) is distinguished from this case, and does not conflict with *Custance* v. *Bradshaw* (2) and *Matson* v. *Swift* (3), as the testator had there himself converted the property in his lifetime, by entering into a contract for sale of it (which could have been enforced against him), and receiving part of the purchase-money; and it was treated, not as liable to be converted, but as having been actually converted by the testator in his lifetime, and that what came to the hands of the executors was money which the testator might have recovered in his lifetime.

[The VICE-CHANCELLOR:—In many cases legacy duty is payable where probate duty is not payable, as in cases of foreign estates paid to a legatee in this country.]

Mr. *Kay*:—The reason is that the probate duty, or something analogous to it, is payable in the foreign country, and that the property is not recovered by virtue of the English probate at all, but by virtue of the foreign probate. Here the conversion is a fictitious thing which does not assist the Crown, and that applies as strongly to a case of legacy duty as of probate duty. If the property does not pay probate duty, it is impossible to suggest that it should pay legacy duty. One thing involves the other. The ordinary could not claim it as personal estate, and, therefore, it would not be liable to probate duty, and that reason applies just as much to legacy duty. By subjecting it to duty in this country, there would be this hardship—that, after paying some Indian duty upon it as real estate, according to the *lex sitûs*, it might have to pay another duty, according to the *lex domicilii*, for the same transmission of the same property.

[The VICE-CHANCELLOR referred to 8 & 9 Vict. c. 76, s. 4.]

(1) 8 H. L. C. 243. (2) 4 Hare, 315.
(3) 8 Beav. 368.

Mr. *Kay*:—There is no gift to be satisfied or paid out of this: it is simply a gift of residue, and the words of that section seem more applicable to a charge.

Mr. *A. Smith* (with Mr. *Kay*):—

The Crown must shew that the enactments of the *Legacy Duty Acts* apply exactly to a case of this kind. 36 Geo. 3, c. 52 (the first which altered it from being a duty on the receipt of the legacy to a duty on the legacy itself) did not charge real estate at all or land devised upon trust for sale, but imposed a duty upon legacies alone (ss. 6, 7). Gifts charged upon, or made payable out of, real estate, or directed to be satisfied out of any moneys to arise from the sale of real estate, were, by 45 Geo. 3, c. 28, first treated as legacies, and subjected to duty. Then followed the schedule to 55 Geo. 3, c. 184.

[The VICE-CHANCELLOR observed that he had never heard of there being any apportionment or inquiry for the purpose of ascertaining, with a view to legacy duty, whether the legacy arose out of this or that class of assets.]

Mr. *Smith*:—It would not be necessary, for this reason, that the *Legacy Duty Acts* charge the legacies, whether payable out of land or not.

[The VICE-CHANCELLOR:—Take the case of a partnership where the partnership property consisted to a great extent of real estate, but on the winding-up of the estate the executors receive some money as their testator's share, and it goes into the assets which they administer: has it ever been considered that the legacy duty was to be apportioned?]

Mr. *Smith*:—In the case of real estate in *England* forming part of the assets of a partnership, it would, I think, be necessary to contend that it came under the *Succession Duty Act*, and not under the *Legacy Duty Acts*. In construing the *Legacy Duty Acts* a limit must be put upon the words of the Act as to places and persons. They are not universal, and cannot possibly apply to all persons, or to all property all over the world. As regards immoveable property, it means immoveable property in *Great Britain;* and as

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regards moveable property, which follows the person, it means moveable property belonging to a person domiciled in *England* (1). If this partnership property had been in *England*, it would not have been liable to legacy duty (*Custance* v. *Bradshaw* (2)), but would have paid succession duty. But being situate in *Bombay*, it is clearly not liable to succession duty, as the *Succession Duty Acts* are confined to real estate in *Great Britain* and *Ireland*. *Attorney-General* v. *Brünning* (3) raises a clear distinction, and shews that where the sale agreed upon by the testator has been afterwards completed, the right of the testator at his death was not a right in land at all, but a right in a sum of money, which money is recoverable, and will follow the law of his domicil, and the right to which will not depend upon the *situs* of the land. What comes within the scope of the Acts is to be found in the words of the Judges in *Thomson* v. *Advocate-General* (4). It is quite clear that the English Acts do not apply to real estate abroad. The only way in which they can be said to apply is in this way—that the right of the testator is not a right to the land at all, but a right to a portion of the surplus of the assets of the firm after all the debts have been paid. But that difficulty was got over in *Custance* v. *Bradshaw*, and if it is held that legacy duty is payable now, probate duty must have been payable in that case.

Mr. *Amphlett*, Q.C., and Mr. *C. Hall*, for the executors of *Mackenzie*, also contended that legacy duty, being chargeable only upon personal or moveable property, or upon the proceeds of the sale of real property where the sale had been directed by the will (45 Geo. 3, c. 28, s. 4; 55 Geo. 3, c. 184, Schedule, Part III. sect. 2), was not payable upon this property, which did not fall under either of these categories.

[The VICE-CHANCELLOR:—If it was not personal estate, how does a residuary legatee get it at all?]

That is met by Vice-Chancellor *Wigram*'s judgment in *Custance* v. *Bradshaw*.

(1) See 1 Jarm. Wills, pp. 1-4, and note (k) at p. 4, and the observations thereon of the commentators.

(2) 4 Hare, 315.
(3) 8 H. L. C. 243.
(4) 12 Cl. & F. 1, 17.

[The VICE-CHANCELLOR:—There is this distinction, that probate duty is payable or not payable according to the character of the property at the time, whereas legacy duty is payable according to what the legatee gets.]

It never became part of the personal estate of the testator, but the executors hold it for the persons who are entitled to the personal estate; and the fact that it has been afterwards converted will not make it liable to legacy duty if it was not liable at the death of the testator: *Matson* v. *Swift* (1), *Custance* v. *Bradshaw* (2); the authority of both which cases was acknowledged without exception in *Attorney-General* v. *Brunning* (3).

A distinction for the purposes of legacy duty has been recognised between a sale of real estate under an imperative direction or trust in the will, and a sale at discretion or by order of this Court, in which cases legacy duty has been held not payable: *In re Evans* (4), *Advocate-General* v. *Smith* (5), *Hobson* v. *Neale* (6). *A fortiori*, as legacy duty would not be payable upon partnership property in this country, it would not be payable where the property was situated in *India*.

Mr. *W. W. Karslake*, for the Commissioners of Inland Revenue:—

Legacy duty is payable upon this property. The effect of 9 Geo. 4, c. 33, is to make real estate in *India* personal estate in this country; and, accordingly, in *Story* v. *Fry* (7) it was held that a freehold house in *Calcutta*, being by that statute made personal assets in the hands of the executor, the heir-at-law was not a necessary party to an administration suit by a creditor of the deceased debtor. No doubt in *Gardiner* v. *Fell* (8), and *Freeman* v. *Fairlie* (9), it was held that the tenure of land in *Calcutta* was of the nature of freehold, and that real estate (before 1 Vict. c. 26) would not pass by a will not attested by three persons. The distinction between 9 Geo. 4, c. 33 (by which land in *India* is personal assets in the hands of the executor), and 3 & 4 Will. 4, c. 104,

(1) 8 Beav. 368.
(2) 4 Hare, 315.
(3) 8 H. L. C. 243.
(4) 2 C. M. R. 206.
(5) 1 Macq. 760.
(6) 17 Beav. 178.
(7) 1 Y. & C. C. 603.
(8) 1 Moo. Ind. App. 299; 1 Jac. & W. 22.
(9) 1 Moo. Ind. App. 305; 1 Jac. & W. 24.

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by which the heir or devisee is made liable personally to answe for the value of the assets, descended or devised (in other words land is assets in the hands of the heir and not of the executor must not be lost sight of. When converted by a sale, the India real estate is converted entirely—is no longer real estate at all and any balance not required for the payment of debts, though i goes to the heir, goes to him as a part of the personal estate the testator. It may be added, in distinction, that what settle legacy duty is domicil, while what settles probate duty is the *lo loci*: *Williamson* v. *Advocate-General* (1); *Attorney-General* v *Napier* (2). It is said that the state of the property at the deat must be looked at to ascertain, not whether probate duty, bu whether legacy duty is payable. But for the purpose of ascertain ing whether legacy duty is payable the true test is, whether th legatee gets money or might get money: *In re Ewin's Estate* (3 where Lord Chief Baron *Alexander* disposes of the argument tha the estate was not liable to legacy duty, because probate duty woul not have been payable. Moreover, in *Custance* v. *Bradshaw* (4 the reasons given by Vice-Chancellor *Wigram* for holding tha probate duty was not payable went upon the old law as to whetho property directed to be converted into personalty was of such nature that, but for the will, the ordinary would have been entitle to take or apply it to pious uses. So, in *Matson* v. *Swift* (5) th Master of the Rolls held that probate duty was "payable onl upon the personal estate in respect of which probate was grante that is, upon the personal estate within the jurisdiction which h had whilst living and at the time of his death." As a matter fact, no case is to be found in which legacy duty has not been pai upon partnership assets derived from real estate. That real estat directed to be sold is liable to legacy duty though not sold, settled by *Attorney-General* v. *Holford* (6), *Williamson* v. *Advocat General*; and where there is a power to sell the direction nee not be absolute, it being sufficient if an evident intention that th property shall be sold can be found; and again, when a sale ha been effected the produce of the sale is liable to duty: *Attorne*

(1) 10 Cl. & F. 1.
(2) 6 Ex. 217.
(3) 1 C. & J. 151.
(4) 4 Hare, 315.
(5) 8 Beav. 368.
(6) 1 Price, 426.

General v. *Mangles* (1), *Attorney-General* v. *Simcox* (2); and herefore the state of the property at the testator's death is not the ole thing to be looked at. The observations of Lord *Brougham* n *Williamson* v. *Advocate-General* (3) explain the expressions in ttorney-General v. *Brunning* (4), and shew that when the Lords peak of looking at the state of the property at the testator's death hey do not mean whether it has been actually converted into noney, but whether there is under the will or by operation of aw an absolute direction to convert. That partnership assets are n this Court considered as converted into money is shewn by *Phillips* v. *Phillips* (5), and especially by *Darby* v. *Darby* (6).

[The VICE-CHANCELLOR referred to *Myers* v. *Perigal* (7), in which it was said that the interest of a partnership subsisting in and was not land.]

To conclude, the Crown is entitled to succeed upon either of hese three grounds:—1. Treating it as real estate in *India*, the aw directs that it shall be converted; 2. This testator, by his will, has said that he treats these proceeds as part of his personal state, and they are personal estate to all intents and purposes for he payment of legacies quite as much as for the payment of debts; nd, 3. Partnership real estate is liable to legacy duty wherever hat partnership real estate may be; and assuming that the Crown ucceeds in this case it is entitled to costs out of the estate: *Lyall* v. *Paton* (8).

Mr. *Kay*, in reply.

April 26. SIR W. M. JAMES, V.C., after stating the question, nd the circumstances attending the purchase of the warehouses at *Bombay*, and the mode of keeping the accounts as stated in the Petition, proceeded as follows:—

After the death of *Mackenzie*, in 1858, litigation ensued between

(1) 5 M. & W. 120.
(2) 1 Ex. 749.
(3) 10 Cl. & F. 15.
(4) 8 H. L. C. 243.
(5) 1 My. & K. 649.
(6) 3 Drew. 495.
(7) 2 D. M. & G. 599.
(8) 25 L. J. (Ch.) 746.

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his representatives and those of Sir *C. Forbes*, in the course of which a claim was set up that *Mackenzie's* interest was that of a tenant in common of one equal undivided moiety. It was, however, decided by my predecessor that this claim was unfounded, and that the property was a partnership asset, and belonged to the partners accordingly in the shares in which they were interested in the partnership. From that decision there was an appeal, and the result of that appeal was a compromise, by which the claim of *Mackenzie's* representatives to a moiety of the profits of the sale, viz. £30,000, instead of one-half, viz. £15,000, was compromised for the sum of £3375, contributed by three of the beneficiaries under Sir *C. Forbes'* will.

Whatever may have been the doubts which led to the compromise, I am bound by the actual decision arrived at by my predecessor—viz., that the property itself was a partnership asset. I pause to mention this, because, in my opinion, it would have very substantially altered the case I have to consider if it could have been made out that the property itself was not a partnership asset, but belonged to the partners as equal tenants in common, subject to the partnership claim of 200,000 rupees.

I have to deal with the property according to the decision of this Court, that it was partnership property, one of the assets of the firm. Now, it has long been the settled law of this Court that real estate, bought or acquired by a partnership for partnership purposes (in the absence of some controlling agreement or direction to the contrary), is as between the partners, and as between the real and personal representatives of a partner deceased, personal property, and devolves and is distributable and applicable as personal estate and as legal assets. There is a very elaborate and exhaustive judgment of Vice-Chancellor *Kindersley* in *Darby* v. *Darby* (1), in which occur the following passages (2), to which it may be well to refer: "Now it appears to me that, irrespective of authority, and looking at the matter with reference to principles well established in this Court, if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the property personalty, and effects a conversion out-and-out. What is the clear principle of

(1) 3 Drew. 495. (2) 3 Drew. 503.

this Court as to the law of partnership? It is that, on the dissolution of the partnership, all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule: it requires no special stipulation; it is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property, is beyond all question; and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie."

The completeness of the conversion is further illustrated by the case of *Myers* v. *Perigal* (1), in which the interest of a partner in partnership assets, consisting partly of freehold property, was held, not only to be personalty, but pure personalty, capable of being validly given to a charity. But it has been contended before me that, conceding that as between the partners, and as between the real and personal representatives of a partner there is this complete and absolute conversion, yet that such conversion only arises by reason of equities to be enforced between the parties, or to be enforced between the representatives; and that the Crown, for fiscal purposes, is not entitled to the benefit of such equitable conversion, and cannot claim either probate duty or legacy duty in respect of the property which at the death was existing as real estate. And that is said to have been established by two cases, one of *Matson* v. *Swift* (2), decided by Lord *Langdale*, and one of *Custance* v. *Bradshaw* (3), decided by the Vice-Chancellor *Wigram*; and there is no doubt that these cases were supposed by many, and are in textbooks of authority treated as having established such a doctrine—viz., that there might be a conversion for all purposes except for fiscal purposes.

Indeed the Court of Exchequer, in the case of *Attorney-General* v. *Brunning* (4), treated that as the principle of those cases, and on their authority proceeded to draw what would seem to be a necessary and logical corollary of such principle if it existed, and to hold that the conversion effected in equity by a

(1) 2 D. M. & G. 599. 17 Jun 145
(2) 8 Beav. 368.
(3) 4 Hare, 315.
(4) 4 H. & N. 94.

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contract for sale not completed at the testator's death was one with which the Crown had nothing to do, and that probate duty was therefore not payable in respect of the purchase-money. However, on appeal to the House of Lords, that tribunal—which, as constituted for the hearing of that appeal, was of almost unexampled authority, consisting as it did of Lords *Campbell, Cranworth, Wensleydale, Chelmsford,* and *Kingsdown*—held that in that case, even although there was the additional circumstance that the contract was subject to the approbation of the Court (which had not been obtained), and was, of course, conditional on a good title being shewn, probate duty was payable.

The broad principle laid down was, that whatever the executor or administrator was entitled to *virtute officii*—whatever was the particular source from which it came, or whatever was the form or position or condition of the property at the death of the testator—it was legal personal assets, and as such, subject, like all other such assets, to the fiscal demands of the Crown. Lord *Chelmsford* sums it up very lucidly thus (1): "It certainly seems extraordinary that property which is recoverable by the executor *virtute officii*, which belongs to the next of kin and not to the heir-at-law, and which has the character of personalty thus impressed upon it in every other respect, should lose that character solely in relation to fiscal liabilities. It is difficult to understand upon what principle the conversion into personalty is to stop short of this point;"—and I take the liberty of adopting every word of that. But then it is said that in that very case every one of the Lords admitted the authority of the case before Lord *Langdale*, and the case before Vice-Chancellor *Wigram;* and it was pressed on me that if I were to overrule either of those cases I should be overruling cases acknowledged by the House of Lords to be well decided; that is to say, I am to hold that the House of Lords, in *Attorney-General* v. *Brunning*, left this as the singular state of the English law: that whereas a conditional and contingent conversion, effected by means of a contract for sale, enures, when completed, for the benefit of the Crown, as well as for everybody else, an unconditional, immediate, and absolute conversion, effected

(1) 8 H. L. C. 265.

by means of the contract of partnership, enures for the benefit of everybody else, but not for the benefit of the Crown.

I am able to say that no such absurdity is chargeable against that tribunal or against the English law.

It will be found on reading the judgments of the Lords that they recognized the decision in the two cases referred to distinctly and expressly, because they had not decided what it was supposed they had decided, and they took pains to shew how completely they had been misunderstood.

The case before Lord *Langdale* was thus explained by Lord *Cranworth* :—"The cases relied on before Lord *Langdale* and Sir *James Wigram* are clearly distinguishable from the present case. In *Matson* v. *Swift* (1), before Lord *Langdale*, the estate remained real estate at the death of the testator, and was only convertible into personalty by virtue of his decision : a decision, it is true, declared, not by his will, but by a previous deed, but which he might have revoked or varied by his will if he had thought fit. And the conversion into personalty, therefore, may truly be treated as having depended on his will." That is to say, it was considered to be exactly the same as if the owner of the property had by his will directed that his real estate should be sold, and the proceeds dealt with as personalty, and that up to the last moment of the deceased's life it was his own freehold property. The case before Sir *James Wigram* was shewn in the same way not to have been a case of conversion for everybody but the Crown, but no case of conversion at all ; and that the property was still legally and equitably the real estate of the deceased partner, which would descend of course as such to the real representatives, subject to any equities the surviving partner would have. And that that was in fact so is clear if reference be made to the conveyances in that case. [His Honour referred to the report of *Custance* v. *Bradshaw* (2).]

It seems to me impossible that there could be a clearer expression of intention between the partners that the properties were not to be deemed converted. It was competent to them to say, and they did say, that although they were bought for partnership purposes they were not to be treated as partnership assets to be realized, but that, subject to the joint power of appointment, each

(1) 8 Beav. 368.

(2) 4 Hare, 315.

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partner was to have as his own separate real estate an undivided share in the specific thing itself.

I have therefore no doubt that the produce of the warehouses, being the produce of a partnership asset, of which Sir *C. Forbes'* estate has in fact obtained the lion's share, because it was purely and simply a partnership asset, is personal estate—personal estate to all intents and purposes—and that the residuary legatees, who are entitled to it only because it falls within the gift of "the residue of his personal estate and property," must take it subject to the legacy duty which the law imposes on residuary legatees. It would take a good deal more than I have yet heard to satisfy me that a man can with the same breath say effectually in this Court, "Give me the money because it is residuary personal estate," and declare that it is not taxable because it is not residuary personal estate.

It might possibly have been sufficient to have rested my judgment on that last condition only. But I thought it more satisfactory to go through the cases and to deal with the elaborate and able arguments addressed to me, and more especially as it was pointed out to me that in the case of Mr. *Mackenzie's* estate, which it was agreed should be taken at the same time, there is not the same kind of estoppel.

Mr. *A. Smith* explained that the question in the suit of *Forbes* v. *Steven* was not whether the property was partnership property—that being admitted on both sides—but whether an agreement subsequent to the death of Sir *C. Forbes* had altered the proportions from 3 and 1 to 2 and 2.

The VICE-CHANCELLOR said that, according to his view, legacy duty would not have been payable upon the £3375 if the question was whether *Mackenzie* was entitled to the moiety by reason of the partnership, because in that case Sir *C. Forbes*, paying £3375 by way of compromise, must be allowed that out of the assets. If paid to *Mackenzie* as a compromise of his claim, it was not a partnership asset, and it would have been brought within *Custance* v. *Bradshaw* (1). But as matters stood legacy duty was payable upon this sum also as part of *Mackenzie's* estate.

(1) 4 Hare, 315.

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The declaration was made in the following form :—

Declare that the residuary personal estate of each of the testators, Sir *C. Forbes* and Mr. *Mackenzie*, in respect of which legacy duty is payable, includes whatever such estates respectively have received in respect of the proceeds of the warehouses at *Bombay*. Costs of the Crown to be paid out of the fund in Court.

Solicitors: Messrs. *Boys & Tweedie*; Messrs. *Lawford & Waterhouse*; *Solicitor for Inland Revenue.*

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International Copyright Acts—Dramatic Piece—Translation sanctioned by the Author—15 *Vict. c.* 12, *s.* 8, *subs.* 6.

The intention of the framers of the *International Copyright Act of* 1852, in requiring that, in order to entitle the foreign author of a dramatic piece to the benefit of the Act, a translation sanctioned by the author must be published within three calendar months of the registration of the original work, was to give to English people the opportunity of knowing the foreign work as accurately as is possible by means of a translation.

A translation such as is required by the Act must be a translation of the whole work; and it is not sufficient that it be a version which the foreign author may have sanctioned as a translation.

Where the original work sought to be protected was a French comedy entitled "*Frou-frou*," and the version sanctioned by the foreign authors and published in *England* was entitled "*Like to Like*;" the names of the characters and the scenery were changed from French to English; in some instances English manners were substituted for French; and considerable omissions of speeches and alterations of passages were made:—

Held, that the version was not a translation within the meaning of the Act, such as to entitle the foreign authors and their assignee to the benefit of the statute.

On the 30th of October, 1869, MM. *Henri Meilhac* and *Ludovic Halévy*, of *Paris*, published for the first time, by representation at the *Gymnase Theatre*, *Paris*, a French comedy, entitled "*Frou-frou*." They also published in *Paris* a printed book of the comedy, which ran to several editions. On the title-page of each copy was a notification to the effect that rights of reproduction, translation, and representation were reserved.

On the 2nd of December, 1869, the book was registered at

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Stationers' Hall as "*Frou-frou : Comédie en cinq Actes ;*" and a copy was deposited there.

By an instrument in writing, in French, dated the 18th of January, 1870, all rights of representation, whether in English or in French, in *Great Britain* and *Ireland*, of the comedy of *Frou-frou*, were assigned by MM. *Meilhac* and *Halévy*, in consideration of £80, to the Plaintiff *George Wood*, of 201 *Regent Street*, *London*, music publisher.

On the 29th of January, 1870, the Plaintiff commenced in a weekly newspaper published in *London*, called *The Musical World*, the publication of a work called "*Like to Like*, a Comedy in Five Acts, being an English version of MM. *Meilhac* and *Halévy's Frou-frou*, written by *H. Sutherland Edwards*." This work was continued in three following numbers of *The Musical World*, and was concluded in the number for the 26th of February, 1870. In each part the above word "version" was accompanied by an asterisk, referring to a foot-note, which was as follows: "This version is sanctioned by the authors, and published with their approval, in conformity with the requirements of the *International Copyright Act of* 1852. (Signed, *H. Meilhac, Ludovic Halévy. Paris*, January 26, 1870.)"

In making this translation, Mr. *Sutherland Edwards* was employed by the Plaintiff, and all Mr. *Edwards'* interest in the same was assigned by him to the Plaintiff.

On the 28th of January, 1870, the Plaintiff was applied to by an agent on behalf of the Defendant Mdlle. *Beatrice Binda*, an actress, to know upon what terms he would allow her to represent on the stage an English version of the comedy. The Plaintiff said that he would grant permission on the terms of the payment of a royalty of £5 for every night the piece was represented. These terms were not accepted.

On the 31st of January, 1870, Mdlle. *Beatrice's* theatrical agent entered at *Stationers' Hall* for her, as proprietor, a translation in manuscript of the French comedy of *Frou-frou*, which had been made by Mr. *Benjamin Webster*, jun., upon instructions given to him by Mdlle. *Beatrice* on the 12th of December preceding.

On the 11th of March the Plaintiff saw in a newspaper an announcement of the intended appearance of Mdlle. *Beatrice* at the

Brighton Theatre in a new version of the Parisian piece called "*Frou-frou*," and immediately wrote to the manager informing him that he, the Plaintiff, was owner of the piece, and would not allow any representation without his sanction. A correspondence ensued; and shortly afterwards Mdlle. *Beatrice* was advertised as about to appear in a new comedy called "*Frou-frou, or Fashion and Passion;* adapted by Mr. *B. Webster*, jun., from the French."

On the 14th of March the representation first took place at the *Brighton Theatre*, and was several times repeated.

The bill in *Wood* v. *Chart* was filed on the 17th of March against *Henry Nye Chart*, the manager of the *Brighton Theatre*, *Beatrice Binda*, and *Horace Wigan*, who also acted in the piece, praying that the first Defendant might be restrained from representing, and the two other Defendants from performing, at *Brighton* or elsewhere in the *United Kingdom*, the piece called "*Frou-frou, or Fashion and Passion*," or any other translation or English version of the French comedy; and for damages.

On the same day the French play was again entered at *Stationers' Hall* as the property of *George Wood;* and the English version, called "*Like to Like*," was entered three times: first as the property of *Henry Sutherland Edwards;* then as having been assigned to the Plaintiff; and, thirdly, as the property of the Plaintiff.

The injunction was moved for on the 24th of March, at which date the performances at *Brighton* had ceased. The motion was directed to stand to the hearing; the Plaintiff to give notice of motion for decree at once. Notice was accordingly, on the 6th of April, given of motion for decree at the expiration of one month.

The facts in the suit of *Wood* v. *Wood*, which was instituted by the same Plaintiff against Mrs. *John Wood*, widow, lessee of *St. James's Theatre*, were as follows:—

In February, 1870, Mr. *Webster's* manuscript translation of the French comedy under the name of "*Frou-frou, or School for Levity*," was deposited at the Lord Chamberlain's office, and a license was obtained to perform the same at *Brighton*, subject to certain omissions.

On the 8th of April a report reached the Plaintiff that a trans-

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lation of *Frou-frou* was in rehearsal at the *St. James's*, and on inquiry at the Lord Chamberlain's office he was shewn a letter addressed by Mrs. *John Wood* to Mr. *Donne*, the reader to the Lord Chamberlain, dated *St. James's Theatre*, 6th of April, 1870, in which it was stated that the version of *Frou-frou*, which had been licensed to Mdlle. *Beatrice*, was proposed to be performed at the *St. James's* in the following week.

The bill was filed on the 11th of April, stating as above, and that the Plaintiff had entered into an arrangement with the lessee and manager of the *Olympic* for the representation there of his, the Plaintiff's, version, which was to be produced on the 16th of April, charging that the Plaintiff would suffer great loss, and praying that the Defendant might be restrained from representing at the *St. James's Theatre*, or elsewhere in the *United Kingdom*, the piece called "*Frou-frou, or School for Levity*," or any other translation or English version of the French comedy; and for damages.

The injunction was moved for on the 14th of April, and granted, but was afterwards dissolved; and the motion was ordered to stand over, and come on with the motion for decree in *Wood* v. *Chart*.

Seven years after the passing of the *International Copyright Act* of the 7 Vict. c. 12 (which repeals the first Act of 1 & 2 Vict. c. 59), that is to say, on the 3rd of November, 1851, a convention was concluded at *Paris* between *Great Britain* and *France*, whereby authors to whom the laws of either country gave copyright were to be entitled to exercise that right in the territories of the other as if the work had been first published in that other country: and so that such authors in the one country "shall have the same remedies before the Courts of justice in the other country, and shall enjoy in that other country the same protection against piracy and unauthorized republication as the law does or may hereafter grant to authors in that country." The convention then proceeds to state that the protection granted to original works is extended to translations, the intention being simply to protect a translator "in respect of his own translation," and several conditions are imposed on the fulfilment of which the right is to depend, amongst which are the following: The original work must have been registered

and deposited in the one country within three months after its publication in the other; the author must notify on the title-page of his work his intention to reserve the right of translating it; and at least a part of the "authorized translation" must appear within one year after the registration and deposit of the original, and the whole be published within three years after the date of such deposit. The stipulations of the convention are to be applicable also to the representation of dramatic works, and the following passages occur:—

"In order, however, to entitle the author to legal protection in regard to the translation of a dramatic work, such translation must appear within three months after the registration and deposit of the original."

"It is understood that the protection stipulated by the present article is not intended to prohibit fair imitations or adaptations of dramatic works to the stage in *England* and *France* respectively, but is only meant to prevent piratical translations.

"The question, whether a work is an imitation or a piracy, shall in all cases be decided by the Courts of justice of the respective countries according to the laws in force in each."

By the *International Copyright Amendment Act* of 1852 (15 Vict. c. 12), after reciting the above convention, it is provided that Her Majesty may, by Order in Council, direct that the authors of books published, and of dramatic works represented, in foreign countries may, for a limited time, prevent unauthorized translations, and that thereupon the law of copyright, and the law for protecting the representation of such pieces, shall extend to prevent such unauthorized translations, with the following proviso (sect. 6):—

"Nothing herein contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country."

Section 8 provides as follows:—

"No author, or his executors, administrators, or assigns, shall be entitled to the benefit of this Act, or of any Order in Council issued in pursuance thereof, in respect of the translation of any book or dramatic piece, if the following requisitions are not complied with (that is to say):

"1. The original work from which the translation is to be made

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must be registered, and a copy thereof deposited in the *United Kingdom*, in the manner required for original works by the said *International Copyright Act*, within three calendar months of its first publication in the foreign country:

"2. The author must notify on the title-page of the original work, or, if it is published in parts, on the title-page of the first part, or, if there is no title-page, on some conspicuous part of the work, that it is his intention to reserve the right of translating it:

"3. The translation sanctioned by the author, or a part thereof, must be published either in the country mentioned in the Order in Council by virtue of which it is to be protected, or in the British dominions, not later than one year after the registration and deposit in the *United Kingdom* of the original work, and the whole of such translation must be published within three years of such registration and deposit: . . .

"6. In the case of dramatic pieces the translation sanctioned by the author must be published within three calendar months of the registration of the original work."

By the previous Act of 1844 (7 Vict. c. 12, s. 6) it is provided, that the title of the work, the name and place of abode of the author or composer, and of the proprietor of the copyright, with other particulars, shall be "entered in the register-book of the *Company of Stationers*, in *London*."

The Order in Council was issued on the 20th of January, 1852.

At the hearing of the cause and motion the principal discussion turned upon the question, whether the Plaintiff had complied with the stipulation of the Act, which requires that "a translation sanctioned by the author" be published within three months of the registration of the original.

A written document, signed by MM. *Meilhac* and *Halévy*, and purporting to give the sanction of their authority to Mr. *Edwards's* translation, was produced in Court, but discussion as to its validity became, in the result, unnecessary.

A comparison of the French play with Mr. *Sutherland Edwards's* version shewed that in the former the title of "*Frou-frou*" had been rejected, and that of "*Like to Like*" adopted instead. The number of characters (twelve) was the same in both, but all the names in the French play (*Brigard, Henri de Sartorys, Valréas,*

&c.) were changed into English names (*Royston, Henry Vivian,* Lord *Walsingham,* &c.), except one (*Zanetto*); but though in the English play the name of *Zanetto* appeared in the list of characters, the part assigned to him in the French play, which was short and unimportant, was omitted altogether. The other characters were alike in sex, age, rank, and disposition. The number of acts (five) was the same in both; the French acts were divided into scenes; the English not; but corresponding characters made their entrances and exits in the same order in both; the dialogues were similar, and the plot, action, and ending of the piece were the same.

The differences consisted of changes in descriptions of scenery and manners, and alterations of the dialogues. Thus, for the description of the opening scene, which, in the French, was "*Aux Charmerettes, chez Brigard,*" was substituted, in the English, "*Elm-tree Park, Royston's* country seat;" and throughout the piece the names of English newspapers, of London streets, of popular plays, and of subjects of public discussion in this country, were employed in place of similar matters in France. So as to manners; for the "*courses de Blois*" was given "a military ball," and for "*une casaque orange*" "the uniform of a hussar."

Out of 1582 speeches, 138 were wholly and thirteen partially omitted; sixty-five were condensed into nineteen; one was amplified, and another altered. The omitted speeches, in a large majority of instances, were unimportant, consisting of exclamations and single words, but many contained allusions to immoral conduct on the part of the characters on the stage, or strangers, and some consisted of ambiguous or indelicate phrases. The most important omission was one of a passage near the beginning of the first act, where a speech of one of the characters explains the meaning of "*Frou-frou,*" which is a modern word, formed by imitating the sound produced by the rustle of foliage or (as here) of a silk or satin dress (1).

(1) The word is to be found, for the first time (it is believed) in a French dictionary, in a supplement to the Dictionary of the French Academy, published at *Brussels;* the part of which containing the letter F was published in 1853. In *Hamilton* and *Legros'* French-English Dictionary, *Paris,* 1868, the word is given, and a passage in which it occurs is cited from *Balzac.* It is also in *Littré.*

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Mr. *Eddis*, Q.C., Mr. *D. Roberton Blaine* (of the Common Law Bar), and Mr. *D. Chauncy Beale*, for the Plaintiff:—

The first question is, whether the Plaintiff's version is a translation of the French comedy within the meaning of the Act. We say it is. The names, the scenery, and allusions to manners are changed, but the characters, dialogue, plot, sequence of ideas, and conclusion are the same.

The omissions were made by the translator because the omitted passages are not suited to the English stage. [They were examined *seriatim*.] They have nothing to do with the plot, and are sometimes only *badinage* about immoral conduct, or a *double entendre*. A literal rendering on the Hamiltonian system would result in mere gibberish. Many passages were omitted because they would have been struck out by the Lord Chamberlain before the play was licensed.

The translation must be an "authorized" translation, and must be "published with the sanction" of the author. It is competent for an author to publish such a translation as he thinks will be approved in this country, provided the scenes, dialogues, plot, and *dénouement* are preserved. It is sufficient if he puts the work into an English dress.

[Reference was made to M. *Etienne Blanc's* "*Traité de la Contrefaçon*," *Paris*, 1855 (1), and the notes referring to judicial decisions in *France;* also to *Burke's* Law of International Copyright, 1852 (2).]

Mr. *Kay*, Q.C., and Mr. *Lindley*, for the Defendants in *Wood* v. *Chart*:—

A rendering which, out of nearly 1600 speeches, omits some 150 cannot be a "translation." No doubt an idiom may be turned, but there is no excuse for omission. It is said the passages are unsuited for the English stage; but the proprietor is not bound to represent on the stage what he publishes. The Act defines certain conditions of monopoly, upon the observance of which alone its benefits are to be obtained. A translation of M. *Thiers'* history would probably be within the statute, although the headings of

(1) Pages 176, 177. (2) Pages 86, 87; 98, 99.

the chapters and foot-notes were omitted, if faithful in other respects.

It is no answer that a full translation would produce disgust on the English stage. The object is to supply information as to the contents of the foreign work; as in the case of a drama published in Hindustani.

Another object of the statute is to enable the Court to determine the question of piracy. Had this play been originally written in Russian, the necessity for this provision would become obvious.

[The points of difference between the French plays and the Plaintiff's version were minutely commented upon, with a view of shewing that what Mr. *Sutherland Edwards* had written, and the Plaintiff had published, under the title of "*Like to Like*," was not intended to be a "translation." It might be an "adaptation" to the English stage, but a "translation" it was not; and the Plaintiff himself had described it as a "version."]

Before the second point, namely, whether Mr. *Webster's* version was a "fair imitation or adaptation to the English stage," within the meaning of the 6th section, was entered upon:

THE VICE-CHANCELLOR said he must call upon the Plaintiff's counsel to shew that the Plaintiff's version was a "translation."

Mr. *Eddis*, in reply, on this point only:—

Before the 7 Vict. c. 12 was passed, in 1844, foreigners had no English copyright in dramatic pieces first published abroad. That Act provided (sect. 14) that no Order in Council was to have any effect unless it stated that reciprocal protection was secured. Then came the convention between *France* and *England* in 1851, followed by the Order in Council of January, 1852. The result is, that the country which obtains the benefit of the English Act has to pay a price for the advantage. The 15 Vict. c. 12, interprets the provisions of the former Act, being also an Act of reciprocity.

Then we come to the meaning of "translation." Wherever translation is spoken of in the Act, authorization by the author is always mentioned as an element of such translation. Authorization by the foreign author is a condition precedent to a thing being a translation (see sects. 3, 4, 8, sub-sects. 3, 6).

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[The VICE-CHANCELLOR:—The Act of Parliament does not say that the foreign author's certificate makes that a translation which otherwise would not be one.]

No doubt it must be a translation; but the object is to secure to the foreign author a commercial interest in this country; and he is the best judge of what is likely to be acceptable here. Suppose the original had been in Russian, the Court could not, probably, have entered into the question whether any registered version was or was not a translation.

[The VICE-CHANCELLOR:—The Court might go into evidence.]

No doubt it might, in any case. But, except in cases of fraud and collusion, the version sanctioned by the foreign author is, *primâ facie*, a translation within the Act. The Court will not sit as a tribunal of literary criticism. Translations may be verbal; they may be free, even loose, without losing the right to be so-called. It has been observed that the Plaintiff has used the word "version;" but a version is a closer rendering than a translation.

The Court will put a fair and liberal construction on the statute. Dr. *Johnson* defines "translation" as "the act of turning into another language; interpretation:" also as "something made by translation; version." *Like to Like* comes within that. The other side admit that we may translate idioms, not literally, but by corresponding idioms. Much depends upon the nature of the work. A mathematical treatise would probably have to be translated literally; a political history less accurately, but still closely; a romance more freely; the main object being to make the foreign work intelligible. Poetry, as we know from the instances of *Pope's* "*Homer*," and *Dryden's* "*Virgil*," is allowed a still wider range, and a drama, it is submitted, may be rendered with still greater latitude when the meaning is addressed to the eye, and the scenic effect is one of the main elements. Upon this *Dryden* has some pertinent observations in his Preface to *Ovid's* "Epistles" (1) and "Life of *Lucian*" (2).

(1) The passages are as follows:— "All translations, I suppose, may be reduced to these three heads: first, that of metaphrase, or turning an author

(2) "A translator that would write with any force or spirit of an original must never dwell on the words of his author. He ought to possess himself

Much stress has been laid on the omission of the passage about *frou-frou;* but when the French play was originally published many Frenchmen did not know the meaning of the word; and to an English audience it would be wholly unintelligible.

Then, as to the turning of French names into English, the change of *Zeus, Pallas,* &c., into *Jupiter, Minerva,* &c., is common in ordinary translations. In those dramatic writings in which time and place have nothing to do with the construction of the plot—where human nature and the world at large are the subject—a change of names and of scenery is immaterial.

[The VICE-CHANCELLOR:—You are not obliged to act the very thing you put on the file.]

If a literal translation were put on the file it would be simply unintelligible. The object of the Act is to give the foreign author a right to prevent what are called in the convention "piratical translations," by which are meant translations not authorized by the foreign author.

[The VICE-CHANCELLOR:—A translation might be piratical, and yet not be a "translation" such as is required by the Act.]

What the Act requires is the sanction of the author to the translation.

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word by word, and line by line, from one language into another. Thus, or near this manner, was "*Horace*, his Art of Poetry," translated by *Ben Jonson.* The second way is that of paraphrase, or translation with latitude, where the author is kept in view by the translator, so as never to be lost, but his words are not so strictly followed as his sense; and that, too, is admitted to be amplified, but not altered. Such is Mr. *Waller's* translation of "*Virgil's* fourth Æneid." The third way is that of imitation, where the translator (if now he has not lost that name) assumes the liberty, not only to vary from the words and sense, but to forsake them both as he sees occasion; and taking only some general limits from the original, to run divisions on the ground-work, as he pleases. Such is Mr. *Cowley's* practice in turning two odes of *Pindar*, and one of *Horace*, into English."—*Dryden's* Works (*Scott's* Ed.), xii. 11.

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entirely, and perfectly comprehend the genius and sense of his author, the nature of the subject, and the terms of the act or subject treated of, and then he will express himself as justly, and with as much life, as if he wrote an original; whereas he who copies word for word loses all the spirit in the medium translation." (Vol. xviii. 81.)

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With respect to the representation of the English play, the Plaintiff has to make out his title. His title depends upon the convention and upon the Act.

Now the Act of Parliament, for some sufficient reason, has required, in order to give an author, or the assignee of that author, the particular copyright in question, that the original work shall be deposited; and then, with regard to works other than dramatic works, it says, "the translation sanctioned by the author, or a part thereof, must be published in the British dominions not later than one year after the registration and deposit in the *United Kingdom* of the original work." That is, the translation, or a part thereof; and it goes on to say, that the whole of such translation must be published within three years of such registration and deposit. It contemplates and requires that the whole work shall be translated. It would not be a compliance with that to translate a quarter, or half, or three quarters of a work that is protected, and then say, "that is all I want protected; that is my authorized translation; and I have published the whole of that part which I have thought right to have translated." The requirement is that the work must be translated, and that the translation must be published in this country. And then, for some other sufficient reason, with regard to dramatic pieces, it is provided that "in the case of dramatic pieces the translation sanctioned by the author must be published within three calendar months of the registration of the original work."

Now I do not think it is possible to say that means that anything which the author shall sanction as a translation shall be published within three calendar months. It means that a real translation, being a translation which has been authorized or sanctioned by the author, must be published within three calendar months of the registration of the original work. It appears to me that the Plaintiff in this case has gone out of his course to dig a pitfall for himself, for what he says he has done is—the original thing being called "*Frou-frou*"—he has published in *England* a comedy called "*Like to Like*, a Comedy in Five Acts, being an English version of MM. *Meilhac* and *Halévy's Frou-frou*, written by *H. Sutherland Edwards*." Then he has introduced

English characters; he has transferred the scene to *England;* he has made the alterations necessary for making it an English comedy, and he has left out a great number of speeches and passages—especially in the first act—which would seem to me to imply, that at first he was really making an imitation or adaptation, and afterwards was minded more completely to make a translation. The first two acts seem to me particularly to be what is referred to in the Act itself as an imitation or adaptation. Whether it is a fair imitation or adaptation is another question; but if one wanted to have an example of what is an imitation or adaptation to the English stage, one would have said that this is exactly the thing which is meant. It is an imitation and adaptation to the English stage; that is, you have transferred the characters to *England,* you make them English characters, you introduce English manners, and you leave out things which you say would not be suitable for representation on the English stage. Now that is not, in my view of the case, what the Act requires, for some sufficient purpose as I have said before, when it requires that a translation should be made accessible to the English people. What is required is, that the English people should have the opportunity of knowing the French work as accurately as it is possible to know a French work by the medium of a version in English. That seems to me to be what was intended.

Having come to the conclusion that this is not a translation, I have also come to the conclusion that the Plaintiff has failed in complying with the conditions precedent which the Act has imposed upon him in order to entitle him to sustain this suit.

It is said that one ought to give a liberal interpretation to the statute, and that one ought not to strain the meaning of "translation," or any other word, for the purpose of depriving a foreign author of the benefit of the Act. Of course not. One ought to take a liberal view, and one ought not to strain the words, but one must apply, and give a natural meaning to, the words. According to my view of the case, there would not have been the slightest difficulty whatever in the Plaintiff obtaining the full benefit of his assignment, and of putting himself in a position to prevent any representation of the French play, or of any English translation of it, if he had simply employed Mr. *Sutherland*

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Edwards to do what Mr. *Edwards* could very well have done, namely, to make a translation—that is to say, if he had said, "Now make a translation of this; do not be thinking of adaptation or imitation for the English stage, but make a translation of it." Mr. *Edwards* could have made such a translation, and it could have been published in this country; and if it had been published in this country then it would have been quite open to the author, or the person claiming under the author, to have represented that translation with any abbreviation, with any excision, with any alteration, with any adaptation which he might have thought fit for the purpose of making it more suitable to the English stage. I have no doubt whatever, if he had first published a translation, that he could then have acted the piece which Mr. *Sutherland Edwards* has called a "version," and that nobody else could have acted anything like that—anything approaching to that—because, although I say this is not a translation, but, in my view, is rather an imitation or adaptation to the English stage, I have no hesitation whatever in saying that, if the author had complied with the condition required by the Act of Parliament, or any other person claiming under the author had complied with that condition, I should at once have restrained the acting of such a piece as this by any one else as not being a fair imitation or adaptation, but as being a piratical translation of the original work. That would have been the proper thing for me to have done in that case; but the Plaintiff having brought his suit, not having a title, must fail; and must fail, of course, with the usual consequences of the experiment which he has tried, and must pay the costs.

At present, I am bound to say, I think that the piece complained of is still nearer a translation. I have not heard Mr. *Lindley* out on that part of the case, but I think that Mr. *Webster's* version would have been attacked more easily than Mr. *Edwards'* in the hands of an adverse party would have been, if the Plaintiff had had a proper title. That cannot, in my opinion, make any difference as to the costs, because the suit has been brought by the Plaintiff upon a title which he has not got.

He must pay the costs of the suit of *Wood* v. *Chart*, which will include the costs of the motion for injunction.

In *Wood* v. *Wood* there will be no order on the present motion,

except that the Plaintiff pay the costs of the motion to dissolve. I dissolved the injunction upon the ground that there was not sufficient communication to me of all the facts. There is an ordinary form of order when a motion is refused.

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Solicitors for the Plaintiff: Messrs. *Pike & Son.*
Solicitors for the Defendants: Messrs. *Murray & Hutchins.*

THOMPSON *v.* FISHER.

V.-C. J. 1870 *May* 31.

Will—Construction—Executory Devise.

Devise subject to life interest of testator's widow, upon trust to convey, assign, and assure freehold property "unto and to the use of my son *T. F.*, and the heirs of his body lawfully issuing, but in such manner and form, nevertheless, and subject to such limitations and restrictions, as that if *T. F.* shall happen to die without leaving lawful issue, then that the property may after his death descend unincumbered unto and belong to my daughter *R. F.*, her heirs, executors, administrators, and assigns":—

Held, that the devise was an executory trust to be executed by a conveyance to the use of *T. F.* during his life, with remainder to his first and other sons and daughters as purchasers in tail, with remainder to *R. F.* in fee.

14 Eq 286

ROBERT FISHER, by his will, dated the 5th of December, 1829, after leaving certain property to his wife *Mary Fisher*, and to *Ruth Fisher* his daughter, devised and bequeathed the residue of his landed property, as well freehold as leasehold, to trustees upon trust for his wife *Mary Fisher*, for her life or during widowhood; and after her decease or second marriage, whichever should first happen, upon trust, that the trustees should convey, assign, and assure all his seven houses in *Queen Street*, and on the north side of *Ann Street*, also his malt-kiln and garden behind the same, and also the three cottages in *Bridge Lane*, all situate respectively in *Lancaster* aforesaid, and every of them, with their appurtenances, "unto and to the use of my son *Thomas Fisher* and the heirs of his body lawfully issuing, but in such manner and form nevertheless, and subject to such limitations and restrictions, as that if the said *Thomas Fisher* shall happen to depart this life without leaving lawful issue, then that the said hereditaments and premises and

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every of them may after his decease descend unincumbered unto and belong to my daughter the said *Ruth Fisher*, her heirs, executors, administrators, and assigns, according to the respective nature and tenure thereof."

The testator died in November, 1834; *Mary Fisher*, his widow, died in 1857. *Ruth* his daughter (wife of *Michael Thompson*) died in September, 1866, leaving the Plaintiff, *Robert Fisher Thompson*, her eldest son and heir-at-law.

Thomas Fisher and his wife were both past seventy, and there had never been any issue of their marriage.

The property described in the devise, with the exception of the *Bridge Lane* cottages (which were leasehold), was freehold, of which testator was seised in fee simple. Certain conveyances of the property comprised in the above devise had been executed by *Thomas Fisher*, and these conveyances proceeded on the assumption that he was entitled under the will to be made tenant in tail of the freehold property thereby conveyed.

The Plaintiff *R. F. Thompson*, on the other hand, insisted that, according to the true construction of the will, *Thomas Fisher* became entitled to an estate for his life only, with a limitation over in favour of testator's daughter *Ruth*, and that the direction for such conveyance was an executory trust to be executed by a limitation to *Thomas Fisher* for life, with remainder in favour of his issue as purchasers in tail, with remainder to *Ruth Thompson* in fee. As heir-at-law of *Ruth Thompson*, the Plaintiff claimed to be entitled to the property in fee simple, subject to the life estate of *Thomas Fisher* and the limitations over in favour of his issue.

The bill was filed to carry the trusts of the will into execution, to obtain a declaration to the above effect, and to set aside the conveyances made of the property by *Thomas Fisher*, and in lieu thereof that proper assurances might be made.

Mr. *Joshua Williams*, Q.C., and Mr. *Marten*, for the Plaintiff, contended that an executory trust had been created by the will, and that the Court in such case, looking at the testator's intention, would endeavour to give the fullest possible effect to that intention, by moulding what remained to be done so as to carry it into execution to the extent of disregarding the technical sense of the

language used by the testator: *Leonard* v. *Lord Sussex* (1); *Shelton* v. *Watson* (2); *Davenport* v. *Davenport* (3); *Lewin* on Trusts (4).

Mr. *Eddis*, Q.C., and Mr. *Harrison*, for the Defendants, contended that an estate tail was created in *Thomas Fisher*, and that the Court would not give effect to the supposed general intention (of benefit to *Ruth Fisher* after the death of her brother without issue), as against the particular intention shewn by the use of technical language, to which full legal effect could only be given by construing the devise as an estate tail: *Ex parte Wynch* (5); *Doe* v. *Gallini* (6); *Seale* v. *Seale* (7); *Blackburn* v. *Stables* (8); *Ex parte Davies* (9); *Egerton* v. *Earl Brownlow* (10); *Coltsmann* v. *Coltsmann* (11); *Viscount Holmesdale* v. *West* (12).

SIR W. M. JAMES, V.C.:—

The case is, I think, clear, both upon principle and on authority. Referring to the distinction between an executory trust and a trust executing itself, stated by Lord *St. Leonards* in *Egerton* v. *Earl Brownlow* (13): "Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the Court to make out from general expressions what his intention is; or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates?"—this is as exactly the case of an executory trust as could be. The testator has not been his own conveyancer. He has directed the trustees to convey, assign, and assure the property "unto and to the use of my son *T. F.*, and the heirs of his body lawfully issuing, but in such manner and form nevertheless, and subject to such limitations and restrictions, as that if *T. F.* shall happen to die without leaving lawful issue, then," &c. These words evidently contemplated some further instrument in order to complete the limitations, which must have effect given to them so far as the law

(1) 2 Vern. 526.
(2) 16 Sim. 543.
(3) 1 H. & M. 775.
(4) Pages 86-99.
(5) 5 D. M. & G. 188, 207.
(6) 5 B. & A. 621.
(7) 1 P. Wms. 290.
(8) 2 V. & B. 367.
(9) 2 Sim. (N.S.) 114.
(10) 4 H. L. C. 1, 210, 211. (Opinion of Lord *St. Leonards*).
(11) Law Rep. 3 H. L. 121.
(12) Law Rep. 3 Eq. 474.
(13) 4 H. L. C. 210.

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allows. The declaration, in accordance with the prayer of the bill, will be that the will created an executory trust to be executed by a conveyance to the use of *Thomas Fisher* during his life, with remainder to his first and other sons and daughters as purchasers in tail, with remainder to testator's daughter *Ruth* in fee.

Solicitors: Mr. *H. S. Willett;* Messrs. *Brodrick & Gray.*

V.-C. J. 1870 *June* 2.

KETTLEWELL *v.* BARSTOW.

Practice—Motion to dismiss—Waiver.

A Defendant who has been added to the record by revivor cannot, after moving to dismiss for want of prosecution, move to discharge as irregular an order of course to amend, obtained before he was made a party to the suit.

THIS was a motion by the Defendants, *Thomas* and *William Fawcett,* who had been added to the record by revivor, that an order of the 5th of March, 1869, obtained by Plaintiff for amendment of the bill, should be discharged for irregularity.

The bill was filed on the 25th of November, 1868. A plea to the whole bill was filed by *William Fawcett,* one of the original Defendants; and on the 8th of March, 1869, the bill was amended on an order of course, dated the 5th day of March, 1869.

In June, 1869, *William Fawcett* died, and in consequence of an application, by the Defendant *Barstow,* to dismiss the bill for want of prosecution, the suit was, in January, 1870, revived against *Thomas* and *William Fawcett,* the legal personal representatives of *William Fawcett,* deceased.

On the 12th of May, 1870, upon motion by *Thomas* and *William Fawcett* to dismiss the bill for want of prosecution, the usual order was made that replication be filed within fourteen days, or in default that the bill be dismissed.

Replication was filed on the 13th of May. *Thomas* and *William Fawcett* now moved to discharge the order of the 5th of March, 1869.

Mr. *E. Russell Roberts,* in support of the motion:—

After plea filed to the whole bill, an order to amend can only

be obtained by special leave. The order of course, by which the bill was in fact amended, was obtained on a petition containing a *suggestio falsi*, inasmuch as it stated that no answer had been filed, and omitted all reference to the plea: *Neck* v. *Gains* (1); *Morgan's* Chancery Act and Orders (2)—Order IX., Rule 8. The Defendants now moving, being Defendants by revivor only, are not estopped from their present motion by having moved to dismiss for want of prosecution, however such a course might have affected the original Defendant. Upon finding that a suit to which they are made Defendants is pending and not being prosecuted, they are entitled at once to move to dismiss, as the least expensive and simplest course; and their doing so ought not to be held a waiver of any previous irregularities not waived by the original Defendant, and of which the Court could not assume these Defendants to be aware until they were in due course advised upon them.

Mr. *Cottrell* appeared for the Plaintiff.

SIR W. M. JAMES, V.C., said, that when the parties moving found themselves, by virtue of the order of revivor, in the position of Defendants to a bill, two courses were open to them—either to move to discharge the order to amend for irregularity, or to move to dismiss for want of prosecution. They were doubtless advised as to which of these two courses they should pursue; and having selected the latter, and reaped its advantages in obtaining the costs of that motion, they were not entitled to the benefits which they might have obtained by adopting the former. The motion must, therefore, be refused with costs.

Solicitors: Messrs. *R. & W. B. Smith*; Mr. *Hicks*.

(1) 1 De G. & Sm. 223. (2) 4th Ed. p. 411.

M. R.

1870

May 9.

MAWSON *v.* FLETCHER.

Vendor and Purchaser—Conditions of Sale—Right to Rescind—Objection to Title—Compensation—Dispute as to Vendor's Right to Mines.

Upon a sale of freehold land, described as containing valuable limestone and freestone, one of the conditions provided that the purchaser should be considered to have accepted the title, unless he should within a certain time deliver to the vendor some valid objection to the title, and that, if any objection or requisition should be delivered and persisted in, the vendor might rescind the contract; and another condition provided, that if any mistake should appear to have been made in the description of the property, or of the vendor's interest therein, it should not vitiate the sale, but compensation should be given.

The vendor's title-deeds contained a reservation to the lord of the manor of the right to the mines and minerals under part of the property; but the vendor asserted that, by the custom of the manor, the lord's right did not extend to limestone and freestone, and that there were no other minerals under the property. The purchaser having claimed compensation, the vendor rescinded the contract:—

Held, that the purchaser's objection involved a question of title between the vendor and the lord of the manor, and that the vendor was entitled to rescind the contract; and a bill by the purchaser for specific performance with compensation was dismissed.

THIS was a suit by a purchaser of land for specific performance of the contract, with a deduction out of the purchase-money in respect of an alleged right of the lord of the manor to the mines and minerals under part of the land.

The property in question was sold by auction by the Defendants, who were trustees for sale, under a will, on the 2nd of December, 1868, being the 12th lot at the sale, and consisted of several closes of land, containing in the whole 39A. 3R. 26P. The particulars of sale contained the following statements: "Both limestone and freestone of excellent quality abound in this lot, which has a direct communication with the railway." "The tenure of this lot is partly freehold and partly customary, held under the manor of *Great Broughton*, by payment of the yearly customary rents of 3*s.* 6*d.*, 6*s.* 6*d.*, and 5*d.*"

The sale was made subject to special and general conditions. The 5th special condition provided that any part of the property

which had been enfranchised would be sold subject to the rents, exceptions and reservations, and other matters contained in the deed or deeds of enfranchisement.

The 6th and 14th general conditions were as follows:—

"6. The purchaser shall be considered to have accepted the title, unless he shall, within the time limited by the special conditions of sale, deliver in writing to the vendor or his solicitor some valid objection to the title as deduced under these conditions, and any special conditions. If any objection or requisition be delivered and persisted in, the vendor shall be at liberty to rescind the contract, on returning to the purchaser his deposit, without interest or expenses."

"14. If any error or mistake shall appear to have been made in the description of the property, or of the vendor's interest therein, such error or mistake shall not vacate the sale; but if the same shall be pointed out, either by the vendor or purchaser, prior to the time appointed for the completion of the purchase, a compensation or equivalent shall be given or taken by the vendor or purchaser, as the case may require, but the quantity above stated shall be conclusive on the vendor and purchaser."

There was no statement in the particulars or conditions that any part of Lot 12 had been enfranchised, or was subject to any reservation except the customary rents.

Upon the investigation of the title, it appeared that about six acres of freehold land, part of Lot 12, were conveyed in 1811 by *John Ribton* to *John Fletcher*, through whom the Defendants claimed, "subject to such right and privilege as the Earl of *Egremont*, as lord of the manor of *Great Broughton*, might have or be entitled to, to take and carry away the mines or minerals within or under the said premises;" and that the conveyance of the same property to *Ribton*, in 1776, contained the following exception and reservation:—

"Except, nevertheless, and always reserved out of these presents, and the grant and release hereby made unto the Right Honourable *George O'Brien*, Earl of *Egremont*, lord of the manor of *Great Broughton*, his heirs and assigns, all mines of coal, and other mines and minerals whatsoever, which can, shall, or may be wrought,

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won, or gotten in, under, or upon, from, or out of the said close or parcel of land above granted and released, with liberty to search, dig for, win, and work the same at his and their will and pleasure, and to have, make, erect, and use all ways, and means, and contrivances whatsoever now in use, or that may hereafter be in use, for the digging, working, winning, leading off, carrying, and conveying away the said mines and minerals, and to have, use, and exercise all other powers and privileges in, upon, and over the same close and premises, as fully and amply as he, the said Earl, his heirs or assigns, can or may do, in, upon, or over any customary lands or tenements within the manor of *Great Broughton* aforesaid."

The lord of the manor was not a party to either of these conveyances.

The Plaintiff accepted the title, subject to the right of the lord of the manor to the mines and minerals under the land conveyed by the deeds of 1776 and 1811, and claimed compensation in respect of such right. The Defendants replied that the reservation was the result of an enfranchisement and would not be compensated for, and upon the Plaintiff persisting in his claim for compensation, the Defendants, on the 8th of March, 1869, gave him notice that they rescinded the contract, and returned his deposit, which he refused to accept.

The Plaintiff thereupon instituted this suit.

The Defendants by their answer stated that they believed that by the custom of the manor of *Great Broughton*, quarries of limestone and freestone open to and worked from the surface did not belong to the lord of the manor, but to the owner of the soil—the lord's rights, even in customary lands, being confined exclusively to mines worked by underground workings; that their testator and his father had worked the limestone and freestone quarries on part of Lot 12, during a period of nearly sixty years, without any acknowledgment to the lord of his right, and without any interruption or claim by or on behalf of the lord, and that there was no coal or other mineral (except limestone and freestone) under Lot 12.

The Plaintiff made an affidavit, by which he denied that the Defendants' testator or his father had ever worked any quarries or

minerals in or under the land conveyed by the deed of 1776, or in or under any of the freehold portion of Lot 12, and one of his witnesses stated his belief that valuable seams of coal underlay the property; but a witness on the part of the Defendants, who was a coalowner residing in the neighbourhood, deposed that coal had never been found in the district under the strata indicated by the outcrops of limestone and freestone on the land in question.

There was no evidence that the freehold portion of Lot 12 had ever been of customary tenure.

Mr. *Southgate*, Q.C., and Mr. *Dryden*, for the Plaintiff:—

The Defendants' title-deeds prove that part of this land, which they have agreed to sell without any reservation, is subject to the right of the lord to the mines and minerals; the Plaintiff, therefore, even without reference to the 14th condition of sale, would be entitled to specific performance with compensation; though, but for that condition, he would have been entitled to repudiate the contract: *Seaman* v. *Vawdrey* (1); *White* and *Tudor's* Leading Cases (2).

[The MASTER OF THE ROLLS referred to *Earl of Durham* v. *Legard* (3).]

In that case there was a mistake as to the quantity of the land sold, and the compensation would have amounted to half the purchase-money; but here the reservation in respect of which the Plaintiff seeks compensation, is only of the mines and minerals under about one-eighth of the property sold, and the vendors must have known its existence from their own title-deeds. The Defendants at first relied on the 5th special condition, but that does not apply, as there is no evidence that the land in question has ever been enfranchised. As to the case set up by the answer, that the reservation of mines and minerals does not include limestone and freestone quarries, there is no evidence in support of it but the statement of the belief of the Defendants, that by the custom of the manor quarries do not belong to the lord. Mines and minerals include limestone and freestone quarries: *Bell* v.

(1) 16 Ves. 390.
(2) 3rd Ed. vol. ii. p. 499.
(3) 34 L. J. (Ch.) 589.

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Wilson (1); *Midland Railway Company* v. *Checkley* (2). The Defendants insist that they are entitled to rescind under the 6th condition; but reading the whole of that condition, it is clear that the objections and requisitions there mentioned are objections and requisitions as to title, which this objection is not. The 6th and 14th conditions must be so construed as to be consistent with each other, and the 14th must be held to apply to all objections other than objections to title, which, but for that condition, would be ground for annulling the sale. In *Painter* v. *Newby* (3), where there were two conditions of sale similar to the 6th and 14th conditions in this case, it was held that the vendor failing to prove a right to renew a lease, which he had agreed to sell as renewable, could not rescind the contract, but must complete the sale, with compensation. In *Nelthorpe* v. *Holgate* (4), where a vendor agreed to sell an interest in fee simple, knowing that another person had a life interest in the property, the Court decreed specific performance, with compensation. In *Hoy* v. *Smythies* (5), where the vendor of a manor represented the fines to be two years' value, and there was a dispute whether the fines were one or two years' value, the Court would have decreed specific performance, with compensation, if the purchaser had not, by taking an objection to the title, enabled the vendor to rescind the contract. Restrictive conditions of sale will be construed strictly against the vendor: *Greaves* v. *Wilson* (6). A vendor is bound to give the fullest information, and cannot protect himself against objections known to himself by general conditions: *Edwards* v. *Wickwar* (7); *Beioley* v. *Carter* (8).

Mr. *Jessel*, Q.C., and Mr. *Jackson*, for the Defendants:—

The Defendants were entitled to rescind the contract. The words of the 6th condition, "any objection or requisition," are not to be confined to objections or requisitions as to title. But even if this narrow construction be adopted, this is an objection to title. The Plaintiff says that the Defendants have no title to the quarries. The Defendants say that they have a title, inasmuch as

(1) Law Rep. 1 Ch. 303.
(2) Ibid. 4 Eq. 19.
(3) 11 Hare, 26.
(4) 1 Coll. 203.
(5) 22 Beav. 510.
(6) 25 Ibid. 290.
(7) Law Rep. 1 Eq. 68.
(8) Ibid. 4 Ch. 230.

the lord's right (if any) is confined to underground mines. The Court cannot decide the question without going into the question of title between the Defendants and the lord of the manor, and cannot make a decree for specific performance without directing an inquiry as to the title to the quarries. The Defendants did not wish to be involved in the expense and trouble of such an inquiry, and they therefore reserved to themselves the power, which they have exercised, of rescinding the contract. The statements in the answer, that by the custom of the manor the lord is not entitled to open quarries, and that the predecessors in title of the Defendants have worked quarries on part of Lot 12 for sixty years without interruption, are not displaced. *Bell* v. *Wilson* (1) decided that in a particular instrument minerals included freestone; but how can that decision affect the custom of this manor? The reservation in the deed of 1776, being made to the lord of the manor, who was not a party to the deed, was null and void, and is nothing more than an indication of some ancient reservation. It is not a case for compensation. The quarries are the most valuable part of the estate, and the Defendants will not be compelled to sell the land without them. As to the authorities: *Painter* v. *Newby* (2) turned upon the construction of the conditions of sale, which were different from these conditions; neither in that case, nor in *Nelthorpe* v. *Holgate* (3), was there any dispute about the title, it being admitted in both cases that the vendor had not that which he had agreed to sell. *Hoy* v. *Smythies* (4) is a clear authority in favour of the vendor's right to rescind, and so is *Duddell* v. *Simpson* (5).

Mr. *Southgate*, in reply:—

The Plaintiff denies that the quarries on the piece of land in question have been worked, and this is not contradicted. There is no real dispute about the title. The mines and minerals, whether or not they belong to the lord, are excepted out of the conveyance under which the Defendants derive their title to the land.

(1) Law Rep. 1 Ch. 303.
(2) 11 Hare, 26.
(3) 1 Coll. 203.
(4) 22 Beav. 510.
(5) Law Rep. 2 Ch. 102.

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LORD ROMILLY, M.R.:—

In my opinion this is a very simple case, and when the matter is understood, I think it plain that the Plaintiff has no right to maintain this suit. The sole question to be determined is this. The Defendant sells a plot of land to the Plaintiff. In the conditions of sale he puts one which is to this effect:—"If any objection or requisition be delivered and persisted in, the vendor will be at liberty to rescind the contract, on returning to the purchaser his deposit, without interest or expenses." The question is, whether, upon the facts of this case, the vendor is entitled to the benefit of that condition, he having sent a notice to rescind, and having returned the deposit. In the same conditions of sale there is this further condition: "That if any error or mistake shall appear to have been made in the description of the property, or of the vendor's interest therein, such error or mistake shall not vacate the sale; but if the same shall be pointed out, either by the vendor or purchaser, prior to the time appointed for the completion of the purchase, a compensation or equivalent shall be given or taken by the vendor or purchaser, as the case may require, but the quantity above stated shall be conclusive on the vendor and purchaser." In this Lot 12 what is sold is limestone and freestone quarries. It appears by the abstract delivered that, in a conveyance taken in the year 1776, all the minerals under six acres of this property, which consists of about forty acres, were excepted as belonging to the lord of the manor, and upon that the Plaintiff asks for compensation. I am not now going to discuss or express any opinion upon the question, which of these two conditions of sale is to have predominance over the other, and whether, where they both occur in the conditions of sale, the fact of the purchaser asking for compensation, where there is a manifest error in the description of the parcels or of the interest of the vendor, will preclude the vendor from insisting on the right, which he retained under the condition which I have read, of putting an end to the contract. I am not going to say anything on that question. The condition as to rescinding is certainly expressed in the very broadest terms possible, nor have I met with any condition in any of the cases cited as general as this, that if there is any objection or requisition insisted on the vendor shall be at liberty to rescind the contract. But this

is quite certain, that in all the cases, wherever this question has arisen, the fact of there being an error or misdescription of the interest of the vendor has never been a question of contest. It has been admitted in all the cases that have been cited to me, and I believe in all the cases that can be cited. It certainly was so in *Painter* v. *Newby* (1), *Nelthorpe* v. *Hilgate* (2), and *Hoy* v. *Smythies* (3). In this case the Court cannot decide the question without determining whether there is such an error in the description of the parcels as the Plaintiff alleges. The Defendants deny it, and I must determine that point before I determine whether the Plaintiff is entitled to any compensation. Now, what is the species of misdescription which is alleged here? It is, that there is a reservation in an old deed to the lord of the manor of the mines and minerals. The vendor says, in answer to that, "That may be so, but the mines and minerals do not include limestone and freestone, for by the custom of the manor the copyhold or enfranchised tenants of the manor have always had the right of taking the limestone and freestone—they have done so for sixty years;" and I should have to try that question in the first instance, which it is said, and, I think, truly said, would probably be a very expensive and troublesome inquiry. The vendor, foreseeing this, says: "If you persist in any requisition or objection, I am to be at liberty to rescind the contract." (That condition was put in for the purpose of meeting a case of this description.) "I can prove that I have the right to the freestone and limestone quarries, but I am not going into the great expense and trouble of proving it; I would rather have a new sale." It is clearly an objection to title, if it is not admitted that the error exists. It is not admitted—it is contested—and the sole argument that Mr. *Southgate* suggests to me is, that after the answer has expressly stated that such a custom exists, and has been acted upon for a long period of time, that the lord of the manor has never resisted it, and that there is evidence that there is no coal to be found under this species of stratum, the Plaintiff says, "You have not worked in that particular part." It may be so. If it is so, it does not appear to me to be conclusive, but it would be very strong for me to make a decree, if I had to determine that point merely upon that statement, without the Plaintiff stating his means

(1) 11 Hare, 26. (2) 1 Coll. 203. (3) 22 Beav. 510.

M. R. 1870 MAWSON v. FLETCHER.

of knowledge, and how he has ascertained it. I think, on the contrary, there being such a question to be tried here, if any such right exists, I could not make a decree, even if it were a simple case of specific performance, under which I could, by the decree, direct an inquiry to ascertain if a good title could be made. The Defendants have said, "If you make any such requisition or objection, we will rescind the contract under the 6th condition of sale;" the Plaintiff persists in the objection, and the Defendants rescind the contract. Without expressing any opinion upon the question whether a good title could be made or not, I am of opinion that the Defendants are not bound to go into that question, but are at liberty under that condition of sale to rescind the contract; they have rescinded it, and therefore the bill must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Johnston & Mounsey*, agents for Messrs. *Benson & Moordaff, Cockermouth.*

Solicitors for the Defendants: Messrs. *Bischoff, Bompas, & Bischoff*, agents for Mr. *Waugh, Cockermouth.*

M. R. 1870 *May* 12, 30.

WOOD *v.* WOOD.

General Power of Appointment—Subsequent Limited Power—Exercise during Coverture.

A general power of appointment was given to a *feme sole* under a settlement of her property, with subsequent trusts, in default of appointment, for herself and any future husband, and a power of appointment among children, and with a provision that her after-acquired property should be subject to the same trusts:—

Held, that the general power could be exercised during coverture, and that an appointment made in exercise of it after marriage in favour of the donee of the power and her husband was valid.

Gould v. *Gould* (1) not followed.

BY a settlement, dated the 25th of July, 1867, made previously to the marriage of *Maria Wood* (then *Maria Salmon*, spinster) with *Thomas Wood*, to which *Thomas Wood* was not a party, certain trust funds and leasehold property to which *Maria Salmon* was entitled

(1) 2 Jur. (N. S.) 484.

were vested in trustees, upon trust for such person or persons, including the said *Maria Salmon*, and in such shares as she, by any deed or deeds, with or without power of revocation, or by will, should appoint; and in default of such appointment, for *Maria Salmon* for her life for her separate use; and after her decease without having exercised such power of appointment, in trust for any future husband her surviving for his life; and after his decease, in trust for all the children of any marriage of *Maria Salmon*, at such ages, on such days, and in such shares as she by deed or will should appoint, and in default of such appointment in trust for her children as therein mentioned. And it was thereby declared, that in case there should not be any appointment or appointments as aforesaid, and if there should not be any child or children of *Maria Salmon* who should be entitled under the trusts before referred to, then the trust premises should, after the death of any future husband and failure of issue, be in trust for *Maria Salmon*, her executors, administrators, and assigns; and in case any future husband should survive *Maria Salmon*, and in default of such appointment or appointments, then, after the decease of *Maria Salmon*, and such failure of issue as aforesaid, the trust premises should be in trust for such future husband. And it was thereby declared, that if *Maria Salmon* then was, or if, during any future coverture, she or any future husband of hers in her right should become seised, possessed, or entitled of or to any real or personal estate or interest whatsoever, it should be settled on similar trusts.

The marriage took place on the 3rd of December, 1867.

By a deed-poll of the 7th of December, 1869, purporting to be in exercise of the power of appointment contained in the settlement, *Maria Wood* appointed that the trust property should be in trust for herself and her husband as joint tenants absolutely.

A special case was stated for the opinion of the Court, in which *Maria Wood* and her husband were Plaintiffs, and their infant son and the trustees Defendants, submitting the following questions:

(1). Whether the powers conferred by the settlement on the Plaintiff *Maria Wood*, or any of them, were capable of being exercised during coverture.

(2). Whether the deed-poll was an effectual exercise of such powers.

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Mr. *Southgate*, Q.C., and Mr. *Chester*, for the Plaintiffs:—

Where there is a general power of appointment in a settlement, and a subsequent limited power in default of appointment by the general power, the former power is not cut down; and where a general power of appointment is given to a woman by an antenuptial settlement, that will be exerciseable during coverture, notwithstanding a limited power in default of appointment in the same instrument.

The general rule as to the exercise of powers by married women is stated by Lord *St. Leonards*, in his work on Powers (1), where he observes: "It is not material whether the power is given to an unmarried woman who afterwards marries, or to a woman while she is married . . . in all the cases she may execute the power, and the concurrence of her husband is in no case necessary." He then refers to the case of *Gould* v. *Gould* (2), which was very similar to this, and which will be cited as an authority against the Plaintiffs' contention. In that case a general power of appointment to a single woman under a settlement made by herself was held by implication, from the limitations in default of appointment, not to be exerciseable during coverture. But Lord *St. Leonards* evidently doubts the correctness of that decision, for he adds, after stating it: "The general rule was admitted, and it seems difficult to maintain that the general power was properly confined by construction to the settlor while sole."

We submit that this case is not governed by *Gould* v. *Gould*, as that decision is inconsistent with the law as recognized in other cases. In *Peover* v. *Hassel* (3)—where, under a settlement of the wife's estate, a general power of appointment was given to the husband if there should be any children surviving both parents, and in default of appointment the trust property was to go to the children, and in default of such issue it was to be subject to the general appointment of the wife—it was held that the general power could not be limited. Vice-Chancellor *Wood*, in that case, commented on the case of *Bristow* v. *Warde* (4), which was relied on as shewing that the power must be read as a limited power in

(1) 8th Ed. pp. 154, 155.
(2) 2 Jur. (N. S.) 484.
(3) 1 J. & H. 341.
(4) 2 Ves. 336.

favour of children, and observed that that case did not establish a general rule. *Minton* v. *Kirwood* (1) was a case in which a general power was held not to be controlled by a subsequent limited power; and in *Meade King* v. *Warren* (2), under a voluntary settlement for the benefit of several persons, a power to one who was tenant for life to revoke the trusts of the whole settlement, and to resettle the property as to her might seem meet, was held to be properly exercised by an appointment by the donee of the power to herself.

Here the object of the settlor would be destroyed if the exercise of the general power were controlled: *Mackinley* v. *Sison* (3). We submit, therefore, that the general power in this case was properly exerciseable by *Maria Wood*, notwithstanding coverture, and that the deed of the 7th of December, 1869, was a valid exercise of that power.

Mr. *Waller*, for the infant Defendant:—

This case is governed by *Gould* v. *Gould* (4), which is a distinct authority to shew that a general power like the one in question cannot be taken to override the whole settlement, but must, in the event of marriage, be controlled by the subsequent limitations. The construction for which I contend is further borne out by the provision in this settlement for including after-acquired property, for if the general power is well exercised, the effect will be that the whole of the lady's after-acquired property is taken out of the settlement, which would be quite contrary to the intention. Moreover, the fact of a special power of appointment among children being introduced, shews that it could not have been intended that the general power should be exercised during coverture, so as to deprive her child or children of the share to which they would otherwise be entitled. The power must be taken as one that is suspended during coverture, and therefore, the deed by which the whole trust property is appointed to the lady and her husband is void.

Mr. *Cracknall*, for the trustees.

Mr. *Southgate*, in reply.

(1) Law Rep. 3 Ch. 614.
(2) 32 Beav. 111.
(3) 8 Sim. 561.
(4) 2 Jur. (N.S.) 484.

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May 30. LORD ROMILLY, M.R.:—

The question in this case is whether the general power of appointment contained in the settlement can properly be exercised during coverture. The general principle is that a general power of appointment cannot be cut down to a limited power of appointment among children, except by express words. It was ingeniously argued by Mr. *Waller* that the provision for the settlement of after-acquired property was inconsistent with the Plaintiffs' contention; but I am of opinion that on the whole scope of the deed, and notwithstanding the cases of *Bristow* v. *Warde* (1) and *Gould* v. *Gould* (2), the general power might be exercised by the Plaintiff, *Maria Wood*, at any time, and that there has been a valid exercise of the power by the deed-poll of the 7th of December, 1869.

Solicitors: Messrs. *E. & R. C. Mote;* Mr. *P. J. Gordon.*

M. R. 1870 *June* 29, 30.

HAYDON *v.* ROSE.

Will—Construction—Gift to Individuals at Twenty-one—Gift Over before "payable."

A testator devised his residuary real and personal estate to trustees, upon trust to pay the income to his son during his life, and after his decease to sell the same, and to pay and divide the proceeds among the testator's eleven grandchildren, *nominatim*, as and when they should respectively attain twenty-one; and if any of such grandchildren should die before such share should become payable, without leaving any child him or her surviving, then the share of any grandchild so dying was to go to the survivors; but in case any of such grandchildren should die before his or her share should become payable, leaving any child or children him or her surviving, then the share of him or her so dying was to go to his or her children:—

Held, that the word "payable" in the gift over must be construed "vested," and, therefore, that the share of a grandchild who attained twenty-one, and died in the lifetime of the tenant for life, did not pass under the gift over, but was payable to his legal personal representative.

In re Wilmott's Trusts (3) discussed.

THIS was a suit for the administration of the estate of *Samuel Roberts*, who by his will, dated the 30th of July, 1832, devised and

(1) 2 Ves. 336. (2) 2 Jur. (N. S.) 484. (3) Law Rep. 7 Eq. 532.

bequeathed his residuary real and personal estate to trustees, upon trust to permit the testator's son, the Rev. *William Roberts*, and his assigns, during his life, to receive the rents, issues, and profits thereof; and after the decease of the said *William Roberts*, upon further trust to sell and convert into money all the said residuary estate, and to pay and divide the moneys arising therefrom among the testator's eleven grandchildren, *nominatim*, as and when they should respectively attain the respective ages of twenty-one years, and the interest, dividends, and annual proceeds of each legacy or share to be in the meantime paid and applied by his said trustees for and towards the maintenance and education of such grandchildren respectively; and if any or either of such grandchildren should die before such legacy or share, or any part thereof, should become payable without leaving any child him, her, or them surviving, then he willed and directed that the legacy or legacies, share or shares, of him, her, or them so dying should go to and be equally divided and paid between the survivors of them, share and share alike, and that such accruing share or shares should survive and be divided and paid by his said trustees, together with and in the same manner as the original share and shares thereinbefore by him directed to be divided and paid as aforesaid, and the testator further willed that, in case any of his grandchildren should depart this life before his, her, or their share or shares of his said estate should become payable, leaving any child or children him, her, or them surviving, then that the share and shares of him, her, or them so dying should go to and be equally divided among his, her, or their child or children respectively on attaining the age of twenty-one, so as to place such child or children in the same situation as the parent or parents would have been in if living.

The testator died in January, 1836; *William Roberts*, the tenant for life, died in September, 1867.

Of the eleven grandchildren named in the testator's will, nine had attained twenty-one at the date of the will; one was at that time within a few months of attaining that age, and the eleventh was about seventeen. Both these afterwards attained twenty-one.

All the eleven grandchildren survived the testator, but several of them died in the lifetime of the tenant for life, and the question

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was whether their shares belonged to their legal personal representatives, or passed under the gift over contained in the will.

Mr. *Freeling*, for the Plaintiffs, the trustees of the will.

Mr. *Jessel*, Q.C., Mr. *Cookson*, Mr. *Chapman Barber*, and Mr. *Field*, for parties claiming under the gift over:—

The question turns on the meaning of the word "payable" in the gift over. We contend that the ordinary meaning is to be attached to the word. A share is not payable until the estate has been sold; the estate could not be sold until the death of the tenant for life; consequently, the representatives of those grandchildren who died in his lifetime are not entitled.

It is true that in a certain class of cases, of which *Emperor* v. *Rolfe* (1) is an example, the Court has held that a gift over before the share of a child becomes payable, means before the share has become vested. The reason of these decisions is that, upon any other construction, the children of a child dying before actual payment would not be provided for; but here the testator has, by means of the gift over, made a provision for the issue of a grandchild dying before his share became payable; consequently, the reason for the decisions referred to does not apply. The case is governed by *In re Wilmott's Trusts* (2). In *Jones* v. *Jones* (3), which may seem to be to the contrary effect, the testator had in other parts of the will shewn clearly what meaning he attached to the word "payable." This reasoning is strongly confirmed by the circumstance that, at the date of the will, nearly all the grandchildren had attained twenty-one.

Mr. *Southgate*, Q.C., Mr. *Hanson*, and Mr. *W. Pearson*, for the representatives of the deceased grandchildren:—

In the case of *In re Wilmott's Trusts* (4) there are words to be found which do not occur in the present case. It is true that the Vice-Chancellor did not rely on them; but unless the case can be distinguished on that ground, it is contrary to a long series of authorities: *Walker* v. *Main* (5); *Mocatta* v. *Lindo* (6); *Hayward*

(1) 1 Ves. Sen. 209.
(2) Law Rep. 7 Eq. 532.
(3) 13 Sim. 561.
(4) Law Rep. 7 Eq. 533, 534.
(5) 1 Jac. & W. 1.
(6) 9 Sim. 56.

v. *James* (1); *Mendham* v. *Williams* (2); *West* v. *Miller* (3), which establish the rule that, in such a case, "payable" is to be construed as meaning "vested." [They referred to *Jarman* on Wills (4), *Hawkins* on Wills (5).] The postponement of the period of sale and division until the death of the tenant for life is merely matter of arrangement for the convenience of the estate, and does not affect vesting: *Leeming* v. *Sherratt* (6); *Packham* v. *Gregory* (7); *Taylor* v. *Frobisher* (8).

June 30. LORD ROMILLY, M.R.:—

This is a question on the construction of a will, and the only doubt I had on the matter was caused by a recent decision of Vice-Chancellor *James*, which, unquestionably, seems to me to tend very much to hold that in a will like this the word "payable" means what in ordinary language it does mean. The great respect which I have for that learned and eminent Judge induced me to look into the cases on the subject, and the result is that my first impression is confirmed.

I do not think that the question is, what is the exact meaning which the testator attached to the word "payable?" for it is very difficult to convey to an unprofessional mind the meaning which lawyers attach to the word "vest." I think the question is, whether it is not an established rule of construction in gifts of this description, where there is a gift to *A.* for life, and then a gift to some one at twenty-one, followed by a gift over in case of death before the original gift becomes payable, that the word "payable" should be construed to mean "vested." Unquestionably, in the ordinary use of language, the words "before it becomes payable" would mean before it comes to the hands of the person who is to receive it; but the inconvenience of such a construction, leading as it does to the postponement of the time at which an absolute interest is taken, is so great that the Court has held, in a very long series of deci-

(1) 28 Beav. 523. 6 Jur. N.S. 689.
(2) Law Rep. 2 Eq. 396.
(3) Ibid. 6 Eq. 59.
(4) 3rd Ed. vol. ii. p. 739.
(5) Page 218.
(6) 2 Hare, 14.
(7) 4 Ibid. 396.
(8) 5 De G. & Sm. 191.

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sions, that "payable" shall mean "vested." It is to be observed that the period during which the gift is in suspense cannot by any reasonable construction be prolonged to the exact moment when it comes to the hands of the legatee. Here, for example, it is a gift of the proceeds of land which is directed to be sold on the death of the tenant for life, and no one can doubt that the share of a person dying after the tenant for life would not go over, even although the money had not exactly come to his hands, because it could only come to his hands after it had been received, and there had not been time for a sale to take place.

I think I should be deciding contrary to a great many cases if I were to hold that in this case the share passed under the gift over; and I shall make a declaration accordingly.

Solicitors: Mr. *F. F. Smallpeice;* Messrs. *Dobinson & Geare;* Mr. *Greenway Robins;* Mr. *P. W. Lovett;* Mr. *W. Hunt.*

M. R. 1870 *July* 6, 7.

UPPERTON *v.* NICKOLSON.

Practice—Specific Performance—Inquiry as to Title—Objection raised too late —Time of Essence of Contract—Declaration as to Waiver.

Where a decree has been made for specific performance of a contract for purchase of real estate in the ordinary form, directing an inquiry whether a good title can be made, it is too late for the purchaser to take under that inquiry, for the first time, an objection to title disclosed by an abstract delivered previously to the commencement of the suit, but not taken within the time limited, as of the essence, by the conditions.

Read by 17 W.R. Ch. 426

THIS was a suit for specific performance of an agreement dated the 4th of May, 1868, whereby the Plaintiffs agreed to sell, and the Defendant to purchase, a piece of land situate in the neighbourhood of *Brighton*, and described in the agreement as freehold. The agreement provided that the purchaser should send in writing to the vendors within twenty-eight days after the delivery of the abstract, all his objections and requisitions (if any) in respect of the title, and of all matters appearing on the agreement or on the abstract; and that in this respect time should be of the essence of the extract, and in default of such objections and requisitions (if

none) and subject only to such (if any) the purchaser should be deemed to have accepted the title.

On the 28th of July, 1868, an abstract was sent, disclosing the fact that the land in question was formerly copyhold, and had been enfranchised under the *Copyhold Enfranchisement Act*, so that the mines and minerals under the soil remained the property of the lord of the manor. Requisitions on behalf of the purchaser were sent to the vendors on the 19th of August following; but no requisition or objection was made as to this point.

Disputes afterwards arose between the parties, and the Defendant declined to complete. Thereupon this suit was instituted; and a decree for specific performance was made, and it was ordered that an inquiry be made whether a good title could be made to the property. The bill alleged that all the requisitions made by the Defendant had been satisfactorily answered, and charged that the Defendant had accepted the title; but the decree contained no declaration to that effect.

Under the inquiry the Defendant, for the first time, took the objection that the property was sold as freehold, whereas it was, in point of fact, formerly copyhold, and had been enfranchised under the Copyhold Acts. The Chief Clerk referred the objection to the Court.

Mr. *Ramadge* (Mr. *Jessel*, Q.C., with him), for the Defendant, in support of the objection, referred to 15 & 16 Vict. c. 51, s. 48; 21 & 22 Vict. c. 94, s. 14; *Pretty* v. *Solly* (1).

Mr. *Southgate*, Q.C. (Mr. *H. F. Shebbeare* with him), for the Plaintiffs, submitted that the Defendant was too late in taking the objection.

Mr. *Ramadge*, in reply:—

Under such a decree as this, every objection is open to the Defendant: *Curling* v. *Austin* (2). If the Plaintiffs wished to rely on the provisions of the contract, they should have procured a proper declaration to that effect to be inserted in the decree.

(1) 26 Beav. 606.

(2) 2 Dr. & Sm. 129.

M. R. 1870 UPPERTON v. NICKOLSON.

LORD ROMILLY, M.R.:—

I think that you are precluded by the terms of the agreement from taking this objection. If taken at all, it ought to have been taken within twenty-eight days after the delivery of the abstract, which disclosed the state of the title; but it was not taken then, and it is now too late.

If it had been taken, I think it would have been well founded. The minerals in this particular case may not be of much value; but if a man sells property as freehold, and it turns out that he has no title to the minerals, I think that is a serious objection; but here, I think, the purchaser is precluded from taking it by the contract he has entered into.

Solicitors: Messrs. *Burton, Yeates, & Hart;* Messrs. *Palmer, Palmer, & Bull.*

M. R. 1870 *July* 7.

COLMAN *v.* TURNER.

*Practice—Summons for Administration of Real Estate—Power of Sale with no Devise to Trustees—*15 *&* 16 *Vict. c.* 86, *s.* 47.

The Court has jurisdiction, under 15 & 16 Vict. c. 86, s. 47, to make an order on summons for the administration and sale of a testator's real estate, where the will only gives the executors a power to sell such estate, and to give receipts, without vesting the estate in them by devise.

THIS was a motion to stay proceedings in an administration suit, where a summons had been taken out for the administration of the same estate.

Thomas Colman, the testator in the cause, by his will appointed the Defendants executors thereof, and empowered and directed his executors and trustees, when and as they should think proper, to sell and dispose of all his real estate by public sale or private contract, and assure the same to the purchasers thereof, with power to give receipts; and the testator gave his residuary personal estate to his said trustees, with an ultimate trust of the residue of the trust-moneys for the testator's children. The will contained no devise of the real estate to the trustees.

Two of the residuary legatees filed a bill against the Defen-

dants, for the administration of the testator's real and personal estate.

Before any decree had been made, another of the residuary legatees took out a summons against the same Defendants for the administration of the testator's real and personal estate, under which the usual accounts and inquiries were directed, and the real estate was ordered to be sold.

Mr. *Lindley* now moved, on behalf of the Defendants in both suits, to stay the proceedings in the first suit.

Mr. *Cozens-Hardy*, for the Plaintiffs in the first suit:—

In this case there was no jurisdiction to make an order on the summons for the administration of the testator's real estate, inasmuch as, under the 47th section of the 15 & 16 Vict. c. 86, an order on summons for the administration of real estate can only be made "where the whole of such real estate is by devise vested in trustees, who are by the will empowered to sell such real estate, and authorized to give receipts for the rents and profits thereof, and for the produce of the sale of such real estate." Under this testator's will the real estate was not, by devise, vested in the Defendants; there was only a common-law power of sale. I submit, therefore, that the proper course will be, instead of the proceedings in the first suit being stayed, for a decree to be made in it, as otherwise, if the real estate is sold under the order on the summons, there will be a difficulty in making a good title to the purchaser.

Mr. *Crossley*, for the Plaintiffs in the second suit.

Mr. *Lindley*, in reply, contended that, as the Defendants had power to give receipts, the order was properly made, and that any difficulty as to title could be cured by the concurrence of the heir-at-law.

THE MASTER OF THE ROLLS considered that the order on the summons was properly made, and that the proceedings in the cause must be stayed.

Solicitors for the Plaintiffs in the first suit: Messrs. *Sharpe, Parkers, & Pritchard*, agents for Mr. *Joseph Stanley, Norwich.*

Solicitors for the Plaintiffs in the second suit: Messrs. *Finch & Finch.*

Solicitors for the Defendants: Messrs. *Lydall & Sweeting.*

M. R.

1870

May 4, 5, 6, 26.

CORPORATION OF EXETER *v.* EARL OF DEVON.

Navigable River—Nuisance—Conservancy—Right to abate Nuisance—Right to sue—Harbour, Docks, and Piers Clauses Act, 1847 (10 *Vict. c.* 27), *s.* 12—*General Pier and Harbour Act*, 1861 (24 *&* 25 *Vict. c.* 45), *s.* 14—25 *Vict. c.* 19, *s.* 25.

By a public Act passed in the reign of *Henry* VIII. the corporation of the city of *Exeter* were empowered to remove obstructions to the navigation of the river *Exe*, paying compensation to the owners of the soil where the obstructions were situated :—

Held, first, that this Act did not confer the conservancy of the river on the corporation ; secondly, that it did not entitle the corporation to file a bill in equity to restrain the erection of a pier in the river ; and, thirdly, that it did not confer any right or privilege on the corporation within the meaning of sect. 14 of the *General Pier and Harbour Act*, 1861, so as to prevent the erection of a pier in the river without their consent being obtained.

THE Plaintiffs in this suit were the corporation of the city of *Exeter*, who claimed under a public Act of Parliament, passed in the 31st year of *Henry* VIII. (1), to be legally entitled to the con-

(1) The material portion of this Act, which, though a public Act, is not printed in *Ruffhead's* edition of the Statutes, is as follows :—

" In most humble wise shewen unto your Highness, your true and faithful subjects the maire, bayliffs, and comonaltie of your cittie of *Exeter ;* that where of olde antiquyte as well the cittizens and dwellers within your said cittie, as all other, bothe denizens and straungers, applyinge and comynge from anye parte of beyonde the sea or of this realme to your porte of *Exeter* have had course and recourse with their shippes, boats, and vessels, goodes, and merchandises in the ryver of *Exe*, to and from the highe sea into your said cittie, to the great comoditie, comen wealthe, and profytt of your said cittie and all the countrey there aboute, as by divers records and writinge remayninge, as well in your said cittie as also at *Westm.*, playnlie doeth appeare ; which comoditie of longe tyme hath bene so destroyed and letted by weyres and drivinge of sandes and gravel by course of the water into the said river and other lette and noysaunce, that at this daye and of long tyme paste shippes, boats, and vessels have not had, ne yet can have, their course to and from your said cittie as of olde tyme they have had, by reason whereof your said suppliaunts have bene, and yet be compelled and enforced to carie their goodes and marchandises from the shippes, boats, and vessels to your said cittie by land to their yerelie charge of four hundred marke sterlinge and above, beside great hurte and losses taken in their said goods and merchandises by the cariers of the same, which hath not only bene, and yet daylie is, to the great hurte, decaye, and ympoverishinge of the merchants of your said cittie, but also of the country theraboute by reason of the overflowing

servancy of the river *Exe*, which is a navigable river. The Defendants were *William Reginald* Earl of *Devon*, who, as lord of the

and drownynge of the meadowes, pastures, and grounds lying by the said river with the highe springe of the sea, and the floodes of the freshe water comynge to the said river, and by reason of which charges susteyned in caryinge their goods and merchaundises by lande unto the said cittie as is aforesaid the merchants and owners of the said wares and merchaundises are driven to sell the same much more derer than they would doe if the saide merchaundises myght be conveyed and brought unto the said cittie by water, to the great hurte and prejudice of all your Grace's subjects in the said parties; for reformation whereof it may please your Highness, of your most noble and haboundante grace, with the assent of your Lords spiritual and temporale and the Commons in this present Parliament assembled, and by auethoritie of the same, to enacte, ordeyne, and establish that it maie and shall be lawful at all tymes after the Feaste of Ester now next comynge to your said supplicante maire, bayliffs, and commonaltie of your said cittie of *Exeter* and their successors to plucke down, digge, moyne, breake, banke, and cast upp all and all manner of weyres, rocke, sande, gravell, and others letts and noysannces, whatsoever they be, in the said river, and also in other places and grounde convenient and necessarie for the same whose soever they be lyinge betweene your said cittie and the highe sea, and further to doe and make all other things requisite and necessarie whereby the said shippes, boats, and vessels may have their sure course and recourse in the said river, to and from your said cittie, and their to charge and discharge the said goodes and merchandises without lett or disturbance of any person or persons gevinge and payinge therefore unto the lorde or lordes, owner and owners of the soyle where such digginge and mynynge shall be in recompence and satisfaction of and for the lande and grounde so to be digged and myned after the rate of twentie yeres purchase, or els as much for the same as shalbe adjudged, ordeyned, and determyned by the King's Justices of Assize in the County of *Devon* for the tyme beinge, the eleccon and libtie of which recompence and satisfaction so to be had to be at the choyse of the lordes and owners of the said landes and tenements without any lett, denyer, vexacon, or trouble of the said lorde, lordes, owner and owners, or any other person or persons by suyte in the lawe or otherwise, upon payne of forfeytor of twentie pounds of lefful money of *England* for evye time that they or anye of them doe attempt the contrie thereof, whereof the one halfe shalbe to our said Sovereigne Lorde and theother halfe to him or them that will sue thrfore by accon of debt, bill, plaint, or informaccon in any the King's Courts wherein the parties defendaunts shall not wage his lawe, nor in the said accon, accons, or suyte any essogne, lycence, nor rteccon shalbe allowed, and also givinge and payinge to the tennantes, fermers, and occupyers of such lande or ground, for such hurte and losses as they or any of them shall susteyne and have by the same, as muche as shalbe assessed, adjudged, and determyned by the said Justices of Assizes in the said countie of *Devon* for the tyme beinge, or by such persons as by them shalbe assigned and deputed for the same: the said recompence and satisfaction, as well concerning the lordes and owners of the said lande and grounde, as to

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manor of *Kenton*, is the owner of part of the foreshore of the river, and the *Exe Bight Oyster Fishery and Pier Company, Limited*, who had obtained from the Earl of *Devon* a lease of part of the foreshore belonging to him, and were erecting thereon a pile pier. The object of the suit was to obtain an injunction to prevent the erection of the pier.

It appeared that in the year 1863 the Earl of *Devon* applied to the Board of Trade to make a provisional order under the *General Pier and Harbour Act*, 1861 (24 & 25 Vict. c. 45), and the Amendment Act of the following session (25 Vict. c. 19), to empower him as promoter to construct a pier on the bed of the river *Exe*, at a spot situated between the city of *Exeter* and the mouth of the river. The Plaintiffs opposed the application, as did also the Commissioners of Customs and Quay Dues of the City of *Exeter*, and the pilots residing at *Topsham*, a village on the *Exe*, situated between the city of *Exeter* and the site of the proposed pier. Notwithstanding such opposition the Board of Trade made a provisional order, dated the 25th of March, 1864, and this order was afterwards confirmed by the *Pier and Harbours Order Confirmation Act*, 1864 (27 & 28 Vict. c. 93).

The *General Pier and Harbour Act*, 1861 (24 & 25 Vict. c. 45), enacts (sect. 14) that the promoters shall not by any provisional order under that Act, or by any Act of Parliament confirming such order, be authorized to do any act, matter, or thing, which shall prejudice or affect any right, privilege, power, jurisdiction, or authority acquired by or given to any person (which word by sect. 2 includes corporations) by royal charter, by prescription, or by any local or personal or private Acts, for the purpose of executing any works

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tennantes, fermers, and occupiers of the same, to be payde by the mayre, bayliffs, and commonaltie of the said cittie."

By a private Act of Parliament passed in the present reign (3 Vict. c. lxxiv.) in which the Act of *Henry* VIII. was recited, the corporation of *Exeter* is empowered (s. 31) to cleanse and deepen the channel of any part of the river *Exe* from the city of *Exeter* to the high sea, and to preserve and improve the navigation of such river, in such manner as they shall think proper, and for such purpose to dig up, prostrate, and destroy all manner of weirs, rocks, sands, gravel, and other lets and nuisances whatsoever, in the said river. By sect. 43 all the estates, rights, privileges, tolls, duties, franchises, jurisdictions, or authorities vested in the lord for the time being of the manor of *Kenton* are saved.

such as are contemplated by that Act, or for the management or conservancy thereof, or for protecting the navigation of any tidal waters or navigable river, or for making any river navigable, or otherwise improving, maintaining, or continuing the navigable passage thereof, or any works connected therewith, or which shall, or shall tend to, prejudice or injuriously affect the access to or passage from any quay, pier, harbour, basin, dock, or inland navigation, or the channels or passage thereof, or leading thereto or therefrom, or the use or enjoyment of any quay, pier, harbour, basin, dock, or inland navigation, or the channels or passages thereof, or leading thereto or therefrom, or the use or enjoyment of any quay, pier, harbour, basin, dock, or inland navigation, without the consent in every case of such person or persons; and such consent is to be expressed in writing, and in the case of a corporation to be under their common seal. By sect. 15, any provisional order may incorporate by reference the *Harbour, Docks, and Pier Clauses Act*, 1847, or any part thereof.

The *General Pier and Harbour Act*, 1861, *Amendment Act* (25 Vict. c. 19), is by sect. 1 to be read as one Act with the principal Act; and enacts (sect. 19) that subject to the provisions of the principal Act, and any provisional order, the *Harbour, Docks, and Pier Clauses Act*, 1847, is to be deemed to be incorporated with every provisional order; and also (sect. 25) that the Board of Trade shall not make any provisional order taking away or abridging any right, privilege, power, jurisdiction, or authority given or reserved to any person or corporation by any local or special Act of Parliament, without the consent in writing of such person or corporation; but subject to this restriction, and to the provisions of the principal Act and of that Act, every provisional order, when duly confirmed by Parliament, is to be of full force and effect, any local or special Act to the contrary notwithstanding.

By sect. 12 of the *Harbour, Docks, and Piers Clauses Act*, 1847, the undertakers are prohibited from constructing any portion of their works on the shore of the sea, or of any navigable river communicating therewith, where and so far up the same as the tide flows and reflows, without the consent of Her Majesty, her heirs and successors, to be signified in writing under the hands of two Commissioners of Woods and Forests, and also of the Lords of the

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Admiralty; and it is provided that if the conservancy of the navigable river shall legally belong to any person, the like consent and approval of such person shall also be necessary.

The provisional order made by the Board of Trade and confirmed by the Act of 1864, contains the following clauses:—

"1. The said *William Reginald* Earl of *Devon*, his heirs and assigns, or other his successors in estate, shall be the undertakers of the works authorized by this order."

"17. The undertakers may at any time, by deed, transfer or lease to the *South Devon Railway Company*, their lessees or assigns, or to any other company or corporation, their lessees or assigns, if and when the said railway company, their lessees or assigns, or any other company or corporation, their lessees or assigns, are lawfully empowered to take a transfer or lease under the present provision, or to any person or persons, all or any part of the works herein specified, and the right to receive all or any part of the rates authorized by this order, but so that any deed of transfer or lease under this provision shall not have any effect unless it is made with the approval of the Board of Trade, testified in writing, signed by a secretary of the Board."

"19. Sections 16, 17, 18, 19, 49, and 50 of the *Harbours, Docks, and Piers Clauses Act*, 1847, shall not be incorporated with this order; provided, with respect to the said sects. 49 and 50, that this exception shall not apply if any such transfer or lease as aforesaid is made to any company or corporation, and so long as such transfer or lease remains in operation.

"20. Nothing in this order shall prejudice, diminish, alter, or take away any rates, tolls, or dues belonging or payable to the mayor, aldermen, and burgesses of the city of *Exeter* within the limits of the port of *Exeter*."

The Plaintiffs never gave their approval or consent to the construction of the pier in question.

The Earl of *Devon*, with the approval of the Board of Trade, transferred the pier and the construction thereof to the Defendant company, who commenced their works shortly before August, 1866. On the first of that month the first pile was driven with some ceremony; and an account of the proceedings appeared in the *Exeter* and other local newspapers.

In May, 1867, and again in June, 1868, the Plaintiffs caused notices to be served on the Defendants requiring them to remove the erections already made by them, and to desist from further prosecuting the work; but the Defendants disregarded these notices.

In June, 1868, the Plaintiffs filed the bill in this suit, alleging that the pier would seriously interfere with the navigation of the river *Exe*, and praying that the Defendants, their servants, agents, and workmen, might be restrained from constructing the said pier or any works connected therewith, or any other pier so as to extend or project into the channel of the river *Exe*, and from allowing to remain any pier or projection constructed by them so as to extend or project into the river *Exe*, and from doing any act which should prejudice or affect any right, power, privilege, jurisdiction, or authority of the Plaintiffs under the Acts of *Henry* VIII. and of the Queen, without the consent and approval of the Plaintiffs in writing under their common seal.

In support of their case the Plaintiffs relied much on a decree made by the Court of Exchequer in Trinity Term in the 22nd year of the reign of *Charles* II., in a suit in which the corporation of *Exeter* were Plaintiffs, and *George Browning*, *George Clare*, *Gilbert Clare*, and *John Clare* were Defendants. The facts of this case appeared to be briefly as follows:—Under the powers conferred by the statute of *Henry* VIII. the corporation of *Exeter* bought lands adjoining the river *Exe*, and constructed a canal which runs from the city of *Exeter* along the river for a distance of about six miles. The Defendants *Browning* and the *Clares* were the owners of a mill near the canal; and for the purpose of supplying the mill with water they cut through the banks of the canal, and made a watercourse from thence to the mill, and by this means they withdrew so much water from the canal and river that boats were unable to come up from the sea to the port of *Exeter*. The object of the suit was to restrain these proceedings of the Defendants; and the Court of Exchequer made a decree in favour of the Plaintiffs, ordering the Defendants to stop up the opening which had been made in the canal, and to make the banks thereof as firm as they were before.

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Sir *Roundell Palmer*, Q.C., Sir *Richard Baggallay*, Q.C., and Mr. *Charles Hall*, for the Plaintiffs:—

We are conservators of the river *Exe*, and have as clear a title to maintain a suit to restrain the erection of an obstruction in the *alveus* of the river as if we were riparian owners. A riparian owner is entitled to maintain such a suit although he does not shew any serious injury to his property: *Bickett* v. *Morris* (1); *Attorney-General* v. *Earl of Lonsdale* (2). Here we prove injury to the navigation; indeed it is plain that a pier projecting into the river cannot but obstruct the navigation; and it is no answer to say that a skilful navigator would be able to avoid damage; for the river ought to be open to persons of all degrees of skill.

Mr. *Jessel*, Q.C., and Mr. *Kekewich*, for the Earl of *Devon*:—

The Plaintiffs have no title to sue. A suit of this nature may be maintained on the ground either of public or private injury. In the case of public injury, the Attorney-General must be Informant; of private injury there is none in this case. We deny that the Plaintiffs are conservators of the river. They are entitled under the Acts of Parliament to improve the navigation of the river, and for that purpose to remove obstructions, paying compensation to the owners; but that power gives them no title to sue. An inspector of nuisances is entitled to remove a nuisance; but he has no title to file a bill for that purpose in this Court. If the Plaintiffs are entitled under their Acts to remove this pier, let them do so; they want no assistance from this Court.

Even if the Plaintiffs were conservators they would have no right to sue. Conservators of a river are simply deputies of the King, and fill a position analogous to that of the steward of a manor.

The case in the Exchequer does not support the claim of the Plaintiffs to be conservators, nor is it analogous to the present case. The corporation had constructed a canal; a miller made an opening in the canal and drew away the water; and he was restrained from so doing. That was a clear case of injury to the property of the corporation; for, first of all, the action of the water

(1) Law Rep. 1 H. L., Sc. 47. (2) Law Rep. 7 Eq. 377.

12 Jur. N.S. 803

would tend to make the opening wider, and so destroy the canal altogether, and thus the case is analogous to *Bickett* v. *Morris* (1); and, in the second place, the water was withdrawn to such an extent that boats could not pass, and thus the Plaintiffs' user of the canal was interfered with.

Besides all this, we say that the Earl of *Devon* is not a proper party to the suit; he is simply the landlord of the company, and has taken no active part in erecting the pier.

Mr. *Southgate*, Q.C., and Mr. *Everitt*, for the company:—

The Plaintiffs have no right to sue. Commissioners of sewers could not maintain a suit to restrain a nuisance until the Act 3 & 4 Will. 4, c. 22, was passed, by which the soil of all lands under their cognisance was vested in them: *Duke of Newcastle* v. *Clark* (2); *Crossman* v. *Bristol and South Wales Union Railway Company* (3). In *Vestry of Bermondsey* v. *Brown* (4) it was held that the vestry of a parish could not maintain a suit to restrain an obstruction to a public right of way, except as relators in an information by the Attorney-General. It is quite clear that such a suit as this could be maintained only by the Attorney-General: *Ware* v. *Regent's Canal Company* (5); *Mayor of Liverpool* v. *Chorley Waterworks Company* (6). We admit that the erection of a pier in a navigable river is a nuisance: *Attorney-General* v. *Conservators of the Thames* (7); but we say that we have been authorized by Act of Parliament to erect our pier, and that unless there is something in the Act to give the Plaintiffs a title to interfere, they cannot do so: *Attorney-General* v. *Metropolitan Board of Works* (8). We admit that if the Plaintiffs were conservators, it would seem to be necessary to obtain their consent in the first instance. But we say, in the first place, that the Plaintiffs are not conservators, and on this point we adopt the argument of Mr. *Jessel*; and in the second place, we say that they are debarred from interfering by laches and acquiescence. We began publicly to erect our pier in August, 1866, if not before; the Plaintiffs take no step until May, 1867, and do not file this bill until June, 1868. A

(1) Law Rep. 1 H. L., Sc. 47. 12 Jur. N.S. 1031
(2) 8 Taunt. 602.
(3) 1 H. & M. 531.
(4) Law Rep. 1 Eq. 204. 11 Jur. N.S. 1031
35 Beav. 226.
(5) 3 De G. & J. 212. 5 Jur. N.S. 25
(6) 2 D. M. & G. 852.
(7) 1 H. & M. 1. 8 Jur. N.S. 1203
(8) Ibid. 298.

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corporation may be bound by acquiescence as much as a private individual: *Laird* v. *Birkenhead Railway Company* (1).

Sir *R. Baggallay*, in reply:—

The Plaintiffs are conservators of the river, and were made such by the Act of *Henry* VIII. The rights of conservators are explained in *Hale, De Jure Maris* (2); and it thereby appears that no particular form of words is necessary to create a conservancy. The question in every case is, what is the effect of the words used; and the words of the Act in question are sufficient to confer on the Plaintiffs all the rights of conservators, and more. These rights have been recognised and confirmed by the Act of the present reign.

That being so, the Plaintiffs are in the position of being a limited portion of the public who have a special interest in the navigation of the river *Exe;* and they are, therefore, entitled to maintain this suit: *Spencer* v. *London and Birmingham Railway Company* (3).

Further, the Acts of Parliament under which the Defendants justify the erection of their pier, clearly enact that the pier shall not be erected in a river without the consent of the conservators, and this consent has not been obtained.

May 26. LORD ROMILLY, M.R.:—

This is a bill filed by the Corporation of *Exeter* against the Earl of *Devon* and the *Exe Bight Oyster Company.* The complaint made is this:—That by statute, in 31 Hen. VIII., power is given to the Corporation of *Exeter* to abate all nuisances and hindrances made in the river *Exe;* that this is confirmed by the Act passed in the 3 Vict. for preserving the navigation of the river *Exe.* That in addition to this, the *Harbour, Docks, and Piers Clauses Act,* 1847 (10 Vict. c. 27, s. 12), enacts that no pier shall be constructed in the tide without the consent of the corporation, when the conservancy of the navigable river belongs to any corporation; and further, that the *General Pier and Harbour Act,* 1861, enacts that

(1) Joh. 500. (2) Page 23.

(3) 8 Sim. 193.

the provisional orders and powers contained therein, or in any other Act of Parliament, shall not enable any one to do anything to prejudice rights acquired by royal charter, prescription, or private Acts of Parliament.

The *Exe Bight Oyster Company* have taken a lease from the Earl of *Devon*, and have begun, under the authority of the Board of Trade, to construct a pier in the *Exe*.

The Plaintiffs contend that, under the Act of *Henry* VIII. and the other Acts above-mentioned, they have rights and privileges which are affected by the pier proposed to be erected, that this cannot be done without their consent, and that, instead of consenting, they have protested.

The answers of the Defendants are separate and distinct. The Earl of *Devon* submits that he is in no respect a proper party to the suit. What he has done is this:—He is proprietor of the foreshore, and he has granted a lease of it to the *Exe Bight Oyster Company*. He is not a member of the company, and he has no interest in it; and except so far as he is lessor he has no interest in the matter complained of by the Plaintiffs. The *Exe Bight Oyster Company*, in addition, urge many and very serious objections to the relief sought by the Plaintiffs. The first objection is this: they contest the right of the corporation to sue at all in this matter. A proprietor, they say, no doubt may sue a person who trespasses on his land and erects a nuisance, but this is not that case, for it is not shewn that the corporation have any proprietary right in this matter; certainly they have no land or soil in the place where the pier is erected, or in the neighbourhood thereof. It is also true, no doubt, that when a public nuisance is made it may be abated by a suit; but it must be by the Attorney-General as informant, either *ex officio*, or at the relation of some person. But this is not an information, nor is the pier complained of as a public nuisance, but solely as being a private injury to the corporation. If, therefore, the Plaintiffs are entitled to sue at all, it must be in respect of some right conferred on them by royal grant or by Act of Parliament. No royal grant is produced, and no authority is proved to have been given to them. As to Acts of Parliament, their rights are rested solely and exclusively on the Act of 31 *Henry* VIII., which is given in evidence in this case. For

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the purpose of considering the point which is the main contention of the Plaintiffs, it is necessary carefully to examine this Act. The first thing that appears is, that it does not give the corporation any right to sue. It is true that it does give them a right to abate nuisances on giving a proper compensation to the owner, and the Act of 1847 enacts, that no rights shall be interfered with without the consent of the owner, and it is contended that the power of abating nuisances on giving compensation is a right or privilege conferred on them by the statute of *Henry* VIII., of which they are the owners within the meaning of the Act of 1847, and of which they cannot be deprived without their consent; and that as their consent has not been obtained, and as the pier interferes with these privileges, the Defendants cannot proceed with the pier, but must be injoined from so doing until such consent has been obtained; and their case is put as high as this, that though the corporation is not entitled to withhold its consent maliciously, it is at least not compellable to assign any reason for its refusal, but that the Plaintiffs are the sole judges of the propriety of their assent or refusal.

In order to consider what this right is, it is necessary to examine the Act of *Henry* VIII.:—[His Lordship read the portion set out above, and continued:—]

This, in my opinion, gives nothing but a right to abate nuisances on giving compensation, to be assessed by the Judges of Assize.

Whether under this Act the Plaintiffs could abate this pier is more than doubtful, having regard to all that has passed; but if they could, it could only be on payment of all the compensation due to the Defendants for the injury done to them, which is not offered by the Plaintiffs, nor, indeed, likely to be contemplated by them.

It is, I think, reasonably clear that this Act gives the Plaintiffs no other power if it does not give this; and I am quite clear that this is not the species of right or privilege which is pointed out by the Act of 1861 as one not to be touched without the consent of the owner. The right there referred to means a profitable right or privilege, one that confers a tangible benefit on the person or corporation, not a mere right to pull down another man's wall with or without cause on paying him for the injury so done, even if the Act conferred that right, which I am of opinion it does not.

Except under this Act I see nothing on which the Plaintiffs can rest their case.

I look in vain for any evidence to shew that the corporation are conservators of the river *Exe;* there is nothing to establish this right. The suit in the Exchequer of 1670 has nothing to do with this case. That was a suit to abate a manifest nuisance. It was, in fact, nothing more than this: the corporation had bought land for the purpose of making their canal, and the neighbouring mill-owner took the water from the canal to work his mill; that is to say, an ordinary case of injury to private property.

In truth, the matter in contest between the Plaintiffs and the Defendants rests entirely on the Acts 10 Vict. c. 27, which is the *Harbour, Docks, and Piers Clauses Act,* and the *General Pier and Harbour Act,* 1861, with the *Amendment Act,* 25 Vict. c. 19.

And upon considering these Acts, and what has been done in this matter, I think that the whole matter has been throughout, from the commencement, properly conducted and determined with full notice to the Plaintiffs, and that the matter has been finally determined against them by a competent tribunal.

In the first place, the Earl of *Devon* applied by memorial to the Board of Trade for power to construct the pier with a proper embankment. So far as regards the navigation of the river *Exe,* this was approved by the Lords of the Admiralty.

The prospectus of the company is issued in the meantime. In January, 1864, the Plaintiffs present their memorial to the Board of Trade to prevent the construction of the pier. The Commissioners of Customs and Quay Dues do the same, in the same month; and in February, 1864, the pilots appointed by the Board of Trade, who reside at *Topsham* on the river *Exe,* present a similar memorial.

Thereupon the Board of Trade (after pointing out that they only take cognisance of the interests of the public, and do not decide between conflicting local interests, unless the parties themselves desire their arbitration) enter into a full investigation of the whole matter, and having made certain alterations in the plan, make the provisional order required by the statute.

Thereupon, in July, 1864, an Act of 27 & 28 Vict. c. 93 is passed, which confirms a series of provisional orders made by the

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Board of Trade under the Act of 1861, including, amongst them, that relating to the pier proposed to be constructed in the *Exe* bight, with this limitation:—"Notwithstanding anything hereinbefore contained, the proposed pier shall not be constructed except on such site within the limits of deviation shewn on the deposited plans, and of such dimensions as the Board of Trade may from time to time, before the completion of the pier, direct or approve, with a view to the prevention of injury to the navigation of the river *Exe*."

Afterwards, under this clause, the Board of Trade made some alteration, and finally, on the 1st of August, 1866, the works were begun in their altered form and the first pile was driven. The lease from the Earl to the company bears date the 13th of May, 1866, but though the works were begun in the August following, the Plaintiffs took no step for nine months. At last, in May 1867, they gave a notice to the Earl of *Devon* to desist. In January, 1868, they gave another notice to the *Exe Bight Oyster Company* to a similar effect, and in June, 1868, they filed this bill. This delay is nowhere explained or justified. The Plaintiffs stand by, seeing what is going on, they allow a considerable expenditure of money, and a practical carrying into execution of the works of the company to proceed, and they do nothing. In my opinion the case of the Plaintiffs fails in every way. In the first place they have, I think, no legal right to complain; in the second place, if they had, they are not injured; and thirdly, if they were, they have acquiesced in the Defendants' proceedings.

I say that they are not injured because, after carefully reading and considering the evidence, I am of opinion that the public generally will be greatly benefited by this pier, and that an injury will be inflicted on no one, except that some of the pilots who have hitherto taken vessels in charge from the bight up to the mouth of the canal leading to the city of *Exeter*, and which pilots reside at the village of *Topsham*, may possibly, nay I think probably will, find their custom and business diminished; but even this is doubtful. Unfortunately, it is one of the consequences of improvements that they injure the persons who benefited by the old and inadequate system which is improved upon, and which becomes altered or superseded by the system introduced; but I

am of opinion that this consequence, as a general effect, is contemplated in all cases of this description; that it is not the meaning of these Acts that such a matter should be allowed to stand in the way of such improvements. Whether these pilots would be entitled to any compensation when the amount of their loss, if any, is ascertained, is not the matter before me, nor are they parties to the cause; but it is clear to me that this circumstance has considerably affected the evidence, and that so far as regards the public, and the supply of merchandize by means of the river, a great advantage will be obtained if, as I infer from the evidence, the pier will be much used. On the general merits, therefore, I am of opinion that the public will be gainers. I also think it probable that if I am right in believing that the public generally will be gainers, the inhabitants of the city of *Exeter* itself will also be gainers. That the Corporation of *Exeter* may suffer some loss of pecuniary income may be possible, but nothing to this effect is proved.

I am clear that this pier does not interfere with or affect any property or privilege belonging to the corporation within the meaning of the Act of 1861, and consequently I am of opinion that the consent of the corporation was not required. Everything, in my opinion, has been done that ought to have been done, and the case of the corporation having been brought before the Board of Trade, and decided against the corporation, disposes of their claim except so far they might appeal to Parliament. They had this opportunity, they had the power to renew their opposition before Parliament, when the bill of 1864, confirming the provisional order, passed. They have not done so, or if they have they have failed, and the Legislature have passed the Act confirming the order of the Board of Trade, and that order has the force of an Act of Parliament, and, consequently, disposes of any claim on the part of the corporation. The consequence is that, in my opinion, the bill must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Mr. *W. Denis Moore, Exeter.*

Solicitors for the Defendants: Messrs. *Lake & Co.;* Messrs. *Sympson & Warner.*

V.-C. M.
1870
May 3, 4.

HAWKINS *v.* ALLEN.

Mortmain Act—Erection and Establishment of a Hospital—Acquisition of Land.

A lady gave a cheque for £5000 to the surgeon who attended her, to be laid out in the erection, establishment, and support of a hospital. The money was invested by the surgeon in consols in the names of himself and another as trustees, and both immediately afterwards executed a deed of trust declaring the objects of the gift. The declaration of trust was not made known to the donor, who died a few days after its execution:—

Held, that the object of the gift did not exclude the acquisition of land; and that the donor having died within twelve months after the execution of the deed, the gift was invalid under the statute (9 Geo. 2, c. 36).

MISS *SUSAN DELANCEY*, late of *Cheltenham*, an elderly lady of large fortune, was attended during her last illness by the Plaintiff, *Clement Hawkins*, a surgeon, who frequently spoke to her of the necessity of having a fever hospital established in *Cheltenham*, and upon one occasion, in answer to a question put to him by Miss *Delancey*, he told her it would require about £3500 to carry out the project. To this Miss *Delancey* rejoined that it would be better to have enough, and she desired the Plaintiff to send her bank-book to Messrs. *Drummond's* bank to be made up, in order to ascertain if there was money enough of hers there to pay a cheque for £5000.

The Plaintiff, *C. Hawkins*, thereupon took the bank-book to the Plaintiff, *W. H. Gwinnett*, a solicitor, who was known to Miss *Delancey*, and informed him of what had passed, and, the same day, the bank-book was sent to Messrs. *Drummond*. *W. H. Gwinnett* also prepared a cheque for £5000 for Miss *Delancey's* signature. On the following day, the 25th of March, 1866, the bank-book was returned by post, from which it appeared that a cash balance of nearly £20,000 was standing to the credit of Miss *Delancey* at Messrs. *Drummond's*, and, upon the cheque being handed to her, she signed it, and, with her sanction, the cheque was sent up to a stockbroker in *London*, and the money was invested in the names of the Plaintiff and Mr. *Gwinnett* in £5738 Three per Cent. Consols.

It was then thought desirable by Mr. *Gwinnett* that he and the

Plaintiff, Mr. *Hawkins*, should both execute a declaration of trust of the fund so invested, and, accordingly, a deed-poll, dated the 3rd of April, 1866, was duly executed, whereby it was declared that the Plaintiffs stood possessed of, and interested in, the said sum of £5738, and the dividends thereof, for the purpose of the erection (after the decease of the said *Susan Delancey*), and the future maintenance and support, of a fever hospital. Miss *Delancey* was not aware of the execution of this deed-poll. She died on the 7th of April, 1866, a spinster and intestate, and the four Defendants were her only next of kin. Her personal estate was administered, and amounted to £120,000. The dividends upon the sum of £5738 consols had since been received and accumulated, and the fund now consisted of £6306 7*s.* 3*d.*, standing in the names of the two Plaintiffs *C. Hawkins* and *W. H. Gwinnett*. All the next of kin of Miss *Delancey*, with the exception of one, were desirous that her wishes should be carried out, but the dissentient next of kin insisted upon the invalidity of the bequest.

The bill was therefore filed, praying that it might be declared whether a valid trust had been created of the aforesaid sum of £5000 for the establishment, support, and maintenance of a fever hospital at *Cheltenham*, and that the trust, if valid, might be performed and carried out under the direction of the Court.

The Plaintiffs alleged that they should be able to erect a fever hospital at or near *Cheltenham* with and out of the fund so given by Miss *Delancey*, without applying any part thereof in the purchase or acquisition of land, or any interest therein.

Mr. *Osborne*, Q.C., and Mr. *Chapman Barber*, for the Plaintiffs, the two trustees of the charitable donation:—

This is not a charitable gift coming within the Statute of Mortmain (9 Geo. 2, c. 36). It was not a bequest by will, but a simple subscription for a charitable purpose during the life of the donor. Miss *Delancey* was a rich person, and, upon being told that a fever hospital was much wanted in the town, she gave £5000 for the purpose, just as a poorer person might have given £5. It would be absurd to suppose that every subscription of this nature would be void under the statute. She gave a cheque for the money, but it is the same as if she had handed over a £5 note to the surgeon.

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It certainly was not given for the purpose of purchasing land, and there is evidence to shew that the trustees could acquire land for the erection of the hospital without applying any of this money for the purpose. The intention was the maintenance and support of the hospital; and a gift of this kind was held to be valid in the case of *Attorney-General* v. *Williams* (1), where the object was the establishment of a school. The money in this case was very properly laid out in the purchase of consols, and invested in the names of two gentlemen as trustees of the fund, and, in order to secure the fund for the benefit of the charity, they executed a declaration of trust. This, of itself, prevents the Court from interfering. It was a valid declaration of trust, and it would have been impossible for the donor, during her life, to have recovered the money back from the trustees. So, therefore, the representatives of the donor can be in no better position, and they cannot now recover it against the trustees.

Mr. *Wickens*, on behalf of the Crown, followed the same argument.

Mr. *Cotton*, Q.C., and Mr. *Townsend*, for the Defendants:—

That this is a gift of money involving the purchase of land there can be no doubt, as it comes within the authority of several cases, such as *Attorney-General* v. *Davies* (2), and *Pritchard* v. *Arbouin* (3); and in *In re Watmough's Trusts* (4), a bequest of residuary estate to be given, used, or employed towards the erection of a chapel, was held to be void under the statute, there being no express provision against the acquisition of land. A hospital cannot be built without the acquisition of land to build it upon. The evidence is to the effect that Miss *Delancey* gave the money for the erection and establishment of the hospital, which includes the purchase of land, notwithstanding that the Plaintiffs might be able to acquire land for the purpose of erecting the hospital without using part of this money. The declaration of trust shews that the erection of the building was the object, and afterwards the maintenance. The trust deed also distinctly states that it was to be erected after

(1) 2 Cox, 387.
(2) 9 Ves. 535.
(3) 3 Russ. 456.
(4) Law Rep. 8 Eq. 272.

Miss *Delancey's* death, therefore it is the same as if given by will. If, however, it was a gift during life, then it comes within the words of the statute (9 Geo. 2, c. 36, s. 1), which declares that a gift for a charitable purpose will be void unless made by deed enrolled in the Court of Chancery within six months, and executed more than twelve months before the death of the donor. In the case of *Price* v. *Hathaway* (1), a similar gift was held to be invalid, because, although made by deed duly enrolled within six months, the donor died within twelve months after its execution. In this case the donor died within a fortnight after giving the cheque, therefore there can be no question of the invalidity of the gift. The declaration of trust will not assist the Plaintiffs, for, in *Attorney-General* v. *Ackland* (2), where a sum of money was bequeathed upon trust to be laid out in land for charitable purposes, and the trustee purchased land, of which he took a conveyance to himself upon the trusts expressed in the will, it was held that the trustee could not by such means give effect indirectly to a bequest which was contrary to the *Mortmain Act*. In the case of *Attorney-General* v. *Williams* (3) the gift was sustained upon the express ground that, from the peculiar terms of the bequest, the possibility of applying any of the money towards the acquisition of land was excluded.

Mr. *Osborne*, in reply.

SIR R. MALINS, V.C.:—

The evidence as to the purpose for which this money was given by Miss *Delancey*, is, that she was told of the necessity there was for the establishment of a fever hospital at *Cheltenham*, and upon inquiring how much would be required for the purpose, she was told it would take about £3500, and she then said it would be better to have enough, and subsequently she signed a cheque for £5000, which was with her approbation invested in consols in the names of the two Plaintiffs. The only other evidence is the declaration of trust by which it is declared that the money was held for the purpose of the erection (after the decease of Miss *Delancey*), and the future maintenance and support, of a fever hospital. This

(1) 6 Madd. 304. (2) 1 Russ. & My. 243.
(3) 2 Cox, 387.

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evidence brings the case within the decision in *In re Watmough's Trusts* (1), in which I decided that when money is given for the erection of a building to be dedicated to a charitable purpose, unless the testator by his will indicates an intention that no part of the money shall be applied in the purchase of a site for the building, it falls within the *Mortmain Act* and is void.

If, therefore, Miss *Delancey* had simply given the £5000 for building a fever hospital at *Cheltenham*, that gift would have been void, as it would have included the purchase of land for the purpose. As to the money being given before her death, I find the declaration of trust states that the money is held for the erection "after her death" of a hospital. I have no doubt whatever that she intended the money to be applied immediately for the building of the hospital, and that she would have been glad to have seen it carried out in her lifetime, but the Plaintiffs seem to have come to the conclusion that the building was to be erected after her death. It comes to this then, that it is a case in which a considerable amount of money was given during the donor's life for building a hospital. Of course it would have been void if the gift had been made by will, but the question is whether it is good when made by means of signing a cheque during her life, and the proceeds of the cheque being invested during her life.

I should have been glad to hear that the next of kin had sanctioned the appropriation of the money for the purpose intended by Miss *Delancey*, but it appears that one of the next of kin raises an objection, and desires that the question shall be decided by the Court.

As to the policy of the *Mortmain Act*, it certainly is astonishing that by the law a person may give the whole of his personal property for charitable purposes, but yet he may not give land, nor may he give money to be laid out in land; but such is the law.

The statute recites that many large and improvident alienations and dispositions of property had been made by languishing or dying persons to charitable uses to take place after their death, to the disherison of their lawful heirs.

(1) Law Rep. 8 Eq. 272.

It is clear that the enactments of the statute go far beyond the preamble, because it is provided that no land or money to be laid out in land shall be given during the life of the donor for any charitable purpose. But there is this reservation, "except such gift shall be made by a deed indented, sealed, and delivered in the presence of two witnesses twelve months at least before the death of such donor, and be enrolled in the Court of Chancery within six months after its execution.

The third section declares that all gifts of land, or money to be laid out in land for charitable purposes, shall be void, unless made in the manner and form directed by the Act.

Now, what was the effect of this transaction? If it had been a simple giving of the cheque, with a direction that the money should be invested in consols for this particular purpose, it would have been invalid. How, then, could the declaration of trust alter the position of the case? If the purpose is invalid, there cannot be a valid declaration of trust for an invalid purpose. The invalidity is declared by the declaration of trust, and there would necessarily be a resulting trust in favour of the donor. The trust for building a hospital after the death of the donor is clearly invalid, because it was a trust which, as I have before decided, involved the purchase of land, and as the gift was made less than twelve months before the death of the donor, the gift is as ineffectual as if it had been made by will. If a gift for a charitable purpose would be void if made by will, it is equally void if made by deed, unless the deed is inrolled within six months of its execution, and executed more than twelve months before the death of the donor.

The general purpose of the *Mortmain Act* is explained in the case of *Price* v. *Hathaway* (1), before Sir *John Leach*, where it was held to be unlawful to give land, or money to be laid out in land, unless by a deed executed more than twelve months before the death of the donor.

It appears to me that this case is within the express enactment of the statute, and it is also within the general policy and object of the Act. Though I should have been glad to carry out the intention of the donor, I could not do so without an

(1) 6 Madd. 304

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infringement of the law. I must hold, therefore, that the gift is invalid.

The costs of all parties will come out of the fund.

Solicitors for the Plaintiffs: Messrs. *Meredith & Co.*

Solicitors for the Defendants: Messrs. *Townsend, Lee, & Houseman.*

Solicitors for the Crown: Messrs. *Raven & Bradley.*

V.-C. M. 1870 *March* 25; *June* 10.

In re ARNOLD'S TRUSTS.

Will—Construction—"Other surviving" read "Other."

A testator devised real estate in trust for his children, *G.*, *J.*, *E.*, and *M.*, in equal shares as tenants in common during their respective lives, and after their respective deaths in trust for such of the children of his said children respectively as should attain twenty-one, or die under that age leaving issue, and his, her, or their heirs and assigns, if more than one, as tenants in common; but so that the child or children of each of his children should take his, her, or their parent's share only; and in case of a failure of such issue of either of his said children, then in trust for his other surviving children or child in like manner in all respects as their, his, or her original shares or share were or was thereinbefore given.

E. died in the testator's lifetime, leaving a child; *J.* survived the testator and died childless, leaving *G.* and *M.* and *E.'s* child surviving:—

Held, that the words "other surviving" must be read "other," and that *E.'s* child took one-third of *J.'s* share.

Milsom v. *Awdry* (1) disapproved.

WILLIAM ARNOLD, by his will, dated the 1st of July, 1852, devised all his freehold hereditaments unto his son *George* and his daughter *Julia*, their heirs and assigns, upon trust for themselves and his other children, *Matilda* and *Emma*, in equal shares as tenants in common during the respective lives of his said four children, and after the decease of his said children respectively in trust for such of the children of his said children respectively as should attain the age or respective ages of twenty-one years, or should die under that age leaving lawful issue living at his, her, or their decease or respective deceases, and his, her, or their heirs and

(1) 5 Ves. 465.

assigns, if more than one, as tenants in common; but so nevertheless that the child or children of each of his children should take his, her, or their own parent's share only; and in case of a failure of such issue of either of his said children, then in trust for his other surviving children or child in like manner in all respects as their, his, or her original shares or share were or was thereinbefore given.

The testator died on the 30th of December, 1854. His daughter *Emma* died in his lifetime, in August, 1854, leaving an only child, *Eliza Veale*, who was born in December, 1850. His three other children survived him. *Julia* died unmarried in 1859, leaving her brother *George*, who was a bachelor, her sister *Matilda*, who was married to *James Walter Thomas*, and had only one child, namely, *James William Thomas*, and her niece, *Eliza Veale*, her surviving.

In 1869 the *Bristol* Local Board of Health purchased part of the testator's freehold estates, and paid the purchase-money, £2848 13*s.* 4*d.*, into Court under the *Lands Clauses Consolidation Act*, 1845.

This was a Petition by *George Arnold*, *Matilda Thomas*, and *James William Thomas*, for the investment of the fund in Court on mortgage security, and for payment of the income to the parties entitled under the will.

The Petition raised the question, to whom the share of the testator's freehold estates, to which his daughter *Julia* was entitled for her life, devolved upon her death.

Mr. *Glasse*, Q.C., and Mr. *Hallett*, for the Petitioners:—

The share of *Julia* upon her death became divisible into moieties between *George* and *Matilda*, the testator's surviving children, for their respective lives, with remainder to such of their respective children as attain twenty-one or leave issue, in the same manner as their respective original shares; and *Eliza Veale*, the child of *Emma*, takes no interest in it. The question depends on the construction of the words "other surviving children," and the modern authorities have established the rule that, in construing wills, the words "survivor" or "surviving" must receive their natural meaning, unless the will contains some strong indication that the testator intended to use them in a different sense: *In re Corbett's*

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Trusts (1); *Smith* v. *Osborne* (2); *In re Usticke* (3). Here there is nothing to shew any such intention on the part of the testator, except the improbability that he should make his bounty to the children of each of his children depend on the accident of the parent surviving the person whose share is given over; and that was held in *In re Corbett's Trusts* not to justify the Court in construing the words in any other than their natural sense. *Milsom* v. *Awdry* (4) is on all-fours with the present case, and was treated as a binding authority in *In re Corbett's Trusts*.

[They also referred to *Cripps* v. *Wolcott* (5); *Howard* v. *Collins* (6); *Corneck* v. *Wadman* (7); *Dowling* v. *Dowling* (8); and *In re Potter's Trusts* (9).]

Mr. *Everitt*, for *Eliza Veale*:—

The word "surviving" will be construed "other" when the context requires it: *In re Corbett's Trusts*; *Wilmot* v. *Wilmot* (10). Here the words, "in like manner in all respects as their, his, or her original share or shares are or is hereinbefore given," shew that the testator intended a share of the accruing share to go to the children of each of his other children, whether or not their parent might have survived and taken a life interest. In *Eyre* v. *Marsden* (11), it was held, upon a gift over very similar to this, that the words, "in the same manner as before mentioned touching the original shares," introduced the provision for children in the event of the parents' death before the happening of the accruer, and therefore that the word "surviving" must be construed "other" to give effect to the intention. The effect of construing the word "surviving" strictly in this will would be, that if the last survivor of the testator's children leaves no issue there will be an intestacy as to one fourth share. In *Milsom* v. *Awdry* and *In re Corbett's Trusts* the words were "survivors or survivor;" here the words "other surviving" would make nonsense if construed literally, and the use of the word "other" shews that the testator intended to

(1) Joh. 591.
(2) 6 H. L. C. 375.
(3) 35 Beav. 338.
(4) 5 Ves. 465.
(5) 4 Madd. 11.
(6) Law Rep. 5 Eq. 349.
(7) Law Rep. 7 Eq. 80.
(8) Ibid. 1 Ch. 612.
(9) Ibid. 8 Eq. 52.
(10) 8 Ves. 10.
(11) 2 Keen, 564; 4 My. & Cr. 231, 240.

include all his other children. *In re Usticke* (1) is distinguishable; there in the original gift there was no provision for the children of sons, and therefore no indication of an intention that children of deceased sons should participate in the accruing shares.

Mr. *Babington*, for the Local Board of Health.

Mr. *Glasse*, in reply:—

The decision in *Eyre* v. *Marsden* (2) turned upon the fact that the original gift was made to a class, with a proviso that the issue of those members of the class who should die before the period of distribution should stand in the place of their parents. But here, as in *Milsom* v. *Awdry* (3), the original gift is to the children for their lives with remainder to their children. The present Lord Chancellor, in *In re Corbett's Trusts* (4), followed *Milsom* v. *Awdry*, and distinguished *Eyre* v. *Marsden*.

Mr. *Chitty*, *amicus curiæ*, mentioned *Badger* v. *Gregory* (5).

June 10. Sir R. Malins, V.C.:—

The question on this Petition arises upon the construction of the will of *William Arnold*, made in 1852. The testator at the time of making his will had four children, *George*, *Julia*, *Matilda*, and *Emma*. By his will he devised his freehold estates as follows:—[His Honour read the devise down to the gift over on failure of issue.] That is a plain gift of one fourth to each of the children for life, with remainder to his or her children who should attain twenty-one or leave issue, in fee. Then comes the clause upon which this question arises: "And in case of a failure of such issue of either of my said children, then in trust for my other surviving children or child in like manner in all respects as their, his, or her original shares or share are or is hereinbefore given." It is quite clear that under that clause the accruing shares are given over in the same manner as the original shares—that is to say, to the children

(1) 35 Beav. 338.
(2) 4 My. & Cr. 231.
(3) 5 Ves. 465.
(4) Joh. 591.
(5) Law Rep. 8 Eq. 78.

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for life, with remainder to their children who attain twenty-one or leave issue. The difficulty has arisen in this way: *George* and *Matilda* are now living; *Emma* died in the testator's lifetime, leaving a child who is now living; *Julia* died after the testator's death, unmarried: and the question is, whether upon her death her share of the testator's real estate went to *George* and *Matilda* as the only surviving children of the testator, to the exclusion of *Emma's* child.

Now, the cardinal rule in the construction of wills is to give effect to the intention of the testator. Here the intention of the testator is clearly expressed, that those of his children who survived him in themselves or their children should take original shares; the question is, whether he did not intend that the accruing shares should go in the same way to those of his children who survived in themselves or their children. I think that it is impossible to doubt that this was his intention. The authority principally relied on by Mr. *Glasse* in support of the narrower construction was the case of *Milsom* v. *Awdry* (1). There the words of the will were substantially the same as those of the will before me; and Lord *Alvanley*, after much hesitation, came to the conclusion that the words "survivors or survivor" must be construed strictly, and that the issue of a nephew who was dead at the time of the accruer could not take part of the accruing share. He says himself that his mind fluctuated very much, and that he came to that conclusion with doubt and hesitation. I regret that he came to that conclusion, and am satisfied that it was an erroneous conclusion, and contrary to a long line of subsequent authorities, and that it is no longer a binding authority.

The first case which is opposed to *Milsom* v. *Awdry* is *Wilmot* v. *Wilmot* (2); there the bequest was of one-third of the testator's property to each of his three children at certain ages, and if either of them died before attaining those ages respectively, his or her share to be equally divided between the two surviving children; and in the event of the death of two before such ages, then the whole to go to the surviving child; and if all should die before such ages then over. One of the children attained the specified age and died; then another died under the specified age, and the question was, whether

(1) 5 Ves. 465. (2) 8 Ves. 10.

the whole of his share went to the sole surviving child. The use of the word "surviving" presented no difficulty to the great and experienced mind of Lord *Eldon*, and he decided that it must be construed as "other" to give effect to the plain intention:—[His Honour read the judgment in *Wilmot* v. *Wilmot* (1), and continued:—] Upon this question the case of *Eyre* v. *Marsden* (2) is a leading and most important authority:—[His Honour read the head-note of that case, and continued:—] There it was held, first by Lord *Langdale*, and afterwards on appeal by Lord *Cottenham*, that the word "surviving" must be read "other," and that the issue of the grandchildren who had died were entitled to the same interest in the shares of the grandchildren who died without issue as their parents would have taken if living:—[His Honour read Lord *Cottenham's* judgment on this point (3), and continued:—] The same question arose in *Hawkins* v. *Hamerton* (4), and was decided in the same manner by Sir *Lancelot Shadwell*, who had decided a similar point in the previous case of *Aiton* v. *Brooks* (5).

But it was contended by Mr. *Glasse* that not these earlier authorities, to which I have referred, but the case of *In re Corbett's Trusts* (6), decided by the present Lord Chancellor when Vice-Chancellor, should be the guide for the decision of this case. That was a peculiar case; but I think that the observations of the learned Judge shew that he did not intend to go against the decisions in *Eyre* v. *Marsden* (7) and *Hawkins* v. *Hamerton*, and the other important authorities to which I have referred. He says, "The question as to both clauses is, whether the words 'survivors or survivor' can be read 'others or other'; and I am bound to say, that the later authorities lean more strongly than the earlier ones to the strict construction of words." Now that is often said, but I cannot find that it is so; I think that the rule is, that you must construe the word "survivor" as "other" whenever you see that the testator meant to use it in that sense. Then he goes on to say that, "in cases where it is necessary to do so in order to render a will intelligible, or where a clear and necessary inference

(1) 8 Ves. 10.
(2) 2 Keen, 564; 4 My. & Cr. 231.
(3) 4 My. & Cr. 238-240.
(4) 16 Sim. 410.
(5) 7 Ibid. 204.
(6) Joh. 591.
(7) 4 My. & Cr. 231.

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can be drawn from the terms of the will, the Court will not hesitate to construe the words 'survivors or survivor' as 'others or other.'" [His Honour then read the passage from the same judgment (1), beginning "The other class of cases," and ending "their natural sense," and continued :—] These passages shew that the present Lord Chancellor did not intend to go against these earlier cases; his decision proceeded upon a distinction which he found between the case before him and those cases. I am of opinion that there is no distinction in principle between this case and *Eyre* v. *Marsden* (2) and those other authorities, and therefore I do not feel pressed by the case of *In re Corbett's Trusts* (3).

With regard to the case of *In re Usticke* (4), which was also pressed upon me, I confess that I should have come to a different conclusion upon the construction of that will from that of the Master of the Rolls; but His Lordship proceeded upon the particular language of the will, and did not profess to decide in opposition to *Eyre* v. *Marsden*. I do not, therefore, feel pressed by that case.

In *Smith* v. *Osborne* (5) the word "surviving" was construed to mean "other," notwithstanding the observations of Lord *Cranworth*, which were relied on by Mr. *Glasse*. The latest case on this subject is *Badger* v. *Gregory* (6), decided by Vice-Chancellor *James*. That case was substantially the same as the present case :— [His Honour read the passage from the judgment (7) from "If instead of this simple case," to "vested interest," and continued :—] In that decision I entirely concur. In the present case it is, in my opinion, clear that the testator did not intend the interest of his grandchildren to depend on the accident of their parent surviving or not surviving the period at which the accruer should take place; he has used the words "other surviving children;" I think that he meant "other children," though he has erroneously added the word "surviving."

There must, therefore, be a declaration that the share of *Julia* became divisible in thirds upon her death, and that the daughter

(1) Joh. 597.
(2) 4 My. & Cr. 231.
(3) Joh. 591.
(4) 35 Beav. 338.
(5) 6 H. L. C. 375.
(6) Law Rep. 8 Eq. 78.
(7) Law Rep. 8 Eq. 84, 85.

of *Emma*, if she attains twenty-one or leaves issue, will be entitled to one third of it. V.-C. M. 1870 *In re* ARNOLD'S TRUSTS.

Solicitors for the Petitioners and *Eliza Veale*: Messrs. *Sympson & Warner.*

Solicitors for the Local Board: Mr. *D. Travers Burges.*

STANLEY *v.* COULTHURST.

V.-C. M. 1870 *April* 30; *June* 11.

Will—Construction—Executory Trust—"Strict Settlement"—Life Estate—Impeachment of Waste.

Where an executory trust for the settlement of freehold estates "in strict settlement" directs, either expressly or by reference to the trusts of other property, that certain persons shall take life estates, the use of the words "in strict settlement" does not make the tenants for life dispunishable for waste.

SIR *EDMOND STANLEY*, by his will, dated the 23rd of October, 1842, bequeathed his personal estate to trustees, in trust to pay out of the income an annuity to his daughter *Mary Ann Bontein Stanley* for her life, for her separate use, without power of anticipation, and an annuity to each of his grandsons *Edmond Stanley* and *James Stanley*, to be forfeited on alienation, bankruptcy, or insolvency, and to accumulate the surplus income for twelve years from his death, and at the end of that period to stand possessed of the property and accumulations, upon trust to pay the income to *Mary Ann Bontein Stanley* for her life, for her sole and exclusive use instead of her annuity, and, after her death, to pay the income, "in manner and subject to the restrictions and conditions thereinbefore provided to prevent the alienation or incumbering of the same," to *Edmond Stanley* and *James Stanley* equally as tenants in common during their respective lives, with benefit of survivorship between them, if either should die in the lifetime of the other without leaving issue living at his death, and after their respective deaths, as to a moiety of the property, to the use of, or in trust for, the first son of *Edmond Stanley* who should attain twenty-one, his heirs, executors, administrators, and assigns, with remainder, in

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case such first son should die under twenty-one without leaving issue male living at his death, to the second and every other son successively of *Edmond Stanley* who should attain twenty-one, or die under that age leaving issue male, and the heirs, executors, administrators, and assigns of such sons successively, with remainder, in default of such son or sons, to the use of the daughters of *Edmond Stanley* in equal shares, as tenants in common, the share of each to be vested at twenty-one or marriage, and as to the other moiety, upon similar trusts for the sons and daughters of *James Stanley;* and in case there should be no child of *Edmond Stanley* or *James Stanley* who should become entitled to the personal estate under the trusts of the will, then upon other trusts, with an ultimate trust for the testator's own right heirs and next of kin according to the statute. And the testator empowered and directed his trustees, as soon as a convenient opportunity should occur, to invest all his money, funds, and property in the purchase of fee simple or freehold estates of inheritance in *England* or *Ireland,* and he directed that the estates so to be purchased should be settled "in strict settlement" and by proper conveyances, and should be subject to and enure to the same uses, and upon and for the same trusts, &c., to, upon, and for which the money, funds, and property aforesaid, together with the accumulations thereof, were and stood limited and settled, and should be subject to the like trusts, interests, and purposes, and for and to the same persons respectively, and with such remainders over, as the money, funds, and property thereinbefore vested in his trustees was limited and settled, or as near thereto as the nature and quality of the estates so to be purchased would permit. And he devised a freehold estate in *Ireland* to *Mary Ann Bontein Stanley* for her life, and after her death to *Edmond Stanley* for his life, with remainder to his first and every other son successively, and the heirs male of their respective bodies, "in strict settlement," with remainders over, with an ultimate remainder to his own right heirs.

The testator died in April, 1843, and this suit was soon afterwards instituted by *Mary Ann Bontein Stanley, Edmond Stanley,* and *James Stanley,* for the administration of his estate.

The trustees, with the sanction of the Court, had invested part of the testator's personal estate in the purchase of a freehold

estate, and the question which had arisen, in preparing a settlement of the purchased estate in accordance with the directions in the will, whether the estates limited to the tenants for life should or should not be without impeachment of waste, was, by the direction of the Judge, adjourned into Court.

The case was opened on the 30th of April, when the following authorities were mentioned as bearing upon the question, viz.:— *Davenport* v. *Davenport* (1); *Viscount Homesdale* v. *West* (2); *Bankes* v. *Le Despencer* (3); *White* v. *Briggs* (4); *Aston* v. *Aston* (5); *Littleton* (6); Mr. *Swanston's* note to *Davis* v. *Duke of Marlborough* (7); *Higginson* v. *Barneby* (8); but the argument was postponed.

June 11. Mr. *Freeling*, for infant sons of *Edmond Stanley*, and Mr. *Vaughan Hawkins*, for the trustees:—

The life estates ought not to be limited without impeachment of waste. The rule is clearly laid down in *Davenport* v. *Davenport*, where all the earlier authorities are examined. That case decides that, in making a settlement under an executory trust, if the testator or settlor has expressly directed a life estate to be given, the Court will not make an addition to the life estate by giving the tenant for life power to commit waste, which is a power over the inheritance: *Lewis Bowles' Case* (9); *Littleton* (10) analogous to the power of charging the inheritance with a jointure or portions. But where the testator or settlor has used words which would give the first taker an estate of inheritance, but has used other words shewing an intention that the estate shall be kept in the family, the Court, though it cuts down the estate of the first taker to a life estate, in order to give effect to the general intention, will leave in him the largest possible measure of ownership consistent with his being deprived of the power of alienation, and therefore will not make him impeachable for waste.

The present case, like *Davenport* v. *Davenport*, comes under

(1) 1 H. & M. 775. 10 Jur. N.S. 35.
(2) Law Rep. 3 Eq. 474.
(3) 10 Sim. 576; 11 Ibid. 508.
(4) 15 Ibid. 17; 2 Ph. 583.
(5) Belt's Supplement, 2nd Ed. 142.
(6) Sect. 352.
(7) 2 Sw. 147.
(8) 2 S. & S. 516.
(9) 11 Rep. 149.
(10) Sect. 352.

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the former of these two classes of cases; for here the testator has directed the purchased estates to be settled upon the same trusts as the personal estates in which he had expressly created successive life interests. Moreover, he had annexed to these life interests stringent restrictions to prevent alienation, shewing thereby his intention that the tenants for life should have the least possible measure of ownership; and in his devise of his Irish estate, where he has been his own conveyancer, he has not given the life estates without impeachment of waste. The trustees are directed to purchase land in *England* and *Ireland*, and it is very improbable that the testator intended the same tenants for life to be impeachable for waste in the case of the devised estate, and unimpeachable for waste in the case of a purchased estate in *Ireland*, possibly adjacent to the devised estate. The other side will rely on the use of the words "in strict settlement," and on the observations in *Davenport* v. *Davenport* (1), and upon *Bankes* v. *Le Despencer* (2); but in *Bankes* v. *Le Despencer* the executory trust made no mention of life estates, and in executing the trust life estates were limited only for the purpose of giving effect to the intention that the estate should go along with the barony; and all that the Vice-Chancellor says in *Davenport* v. *Davenport* is, that the term "strict settlement," "without more," is understood to imply estates for life without impeachment of waste. Here there is "more," namely, an express direction to create life estates, and a strong intimation in other parts of the will that they are not to be without impeachment of waste.

[They also referred to *Higginson* v. *Barneby* (3).]

Mr. *Glasse*, Q.C., and Mr. *Speed*, for the mortgagees of the life estate of *Mary Ann Bontein Stanley*, and Mr. *G. S. Green*, for the Plaintiffs:—

In *Davenport* v. *Davenport* two classes of cases are mentioned, in which the Court in executing executory trusts directs the estates for life to be without impeachment of waste: viz., the one, where an estate of inheritance is cut down to a life estate, to give effect to the intention of keeping the property in the family, as in *Leonard*

(1) 1 H. & M. 775. (2) 10 Sim. 576; 11 Sim. 508.
(3) 2 S. & S. 516.

v. *Earl of Sussex* (1) and *White* v. *Briggs* (2); the other, where the words "strict settlement" are used, as in *Bankes* v. *Le Despencer* (3). In the judgment in *Davenport* v. *Davenport*, as reported in the *Jurist* (4), the words "without more" do not occur; but those words only mean that the term "strict settlement" is of itself sufficient to make the estates for life without impeachment of waste. Here, the executory trust begins by a direction to settle the land "in strict settlement;" and the case is completely governed by *Bankes* v. *Le Despencer*, which has always been considered a binding authority. In that case, the same inference, which is attempted to be drawn from the devise of the Irish estate in this will, might have been drawn with greater force from the fact that the two life estates limited by the settlement which immediately preceded the executory trust were not limited without impeachment of waste. In *Woolmore* v. *Burrows* (5), where the direction was that the estate should be "closely entailed," the tenants for life were made unimpeachable of waste.

The restrictions from alienation, which the testator imposed on the life interests in the personalty, were intended to secure the personal enjoyment of the income by the tenants for life, and have no analogy to a restriction from committing waste.

SIR R. MALINS, V.C., after reading the material parts of the will, continued:—

Real estates of considerable value have been purchased in pursuance of the direction in the will, and as this is an executory trust, it has been referred to Chambers to prepare a proper settlement of the estates which have been purchased. The conveyancing counsel of the Court, in preparing the settlement, has felt a difficulty upon the question, whether the tenants for life are to be impeachable or unimpeachable for waste—a most material difference as to their power over the estate—and the matter having come before me in Chambers, I directed that it should be adjourned into Court. Now, I quite agree that this is a question of the intention of the testator; but it has been argued, not only upon the intention as shewn by

(1) 2 Vern. 526.
(2) 15 Sim. 17; 2 Ph. 583.
(3) 10 Sim. 576; 11 Sim. 508.
(4) 10 Jur. (N.S.) 35.
(5) 1 Sim. 512.

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the particular language of this will, but also upon the general principles and rules of the Court in reference to executory trusts, the authorities principally relied on in the argument being the cases of *Bankes* v. *Le Despencer* (1) and *Davenport* v. *Davenport* (2). I will first consider the general principles. I think it is clear that where property is given to be settled upon *A.* and his family in strict settlement, inasmuch as that would be, but for the words in "strict settlement," a gift of an estate of inheritance to *A.*, which would of course give him the right to commit waste, the Court, though it cuts down the estate given to *A.* to a life estate in order to give effect to the words "in strict settlement," gives to *A.* the utmost power over the property consistent with his estate being so cut down, and therefore makes him unimpeachable for waste. I think it is equally clear, that where the direction is to settle the property upon *A.* for life with remainder to his sons successively in tail, with remainder to *B.* for life, with remainder to his sons successively in tail, with remainder over, the tenants for life take simply life estates with the ordinary restrictions attached by law to life estates, and are therefore impeachable for waste. That was the case of *Davenport* v. *Davenport;* there the trust was to settle the estate to the use of *George Horatio Davenport* for life, with remainder to his first and other sons successively in tail male, or tail general, or in tail male with remainder in tail general, or otherwise in tail, as he should think proper, with remainder to *H. T. Davenport* for life, with remainder to his first and other sons in tail, and so forth; and it was held, and correctly held, as no one can doubt, that the tenants for life must be impeachable for waste. It is true that, in that case, in commenting on *Bankes* v. *Le Despencer*, the present Lord Chancellor has used this expression: "The decision may be sustained on the ground that the term 'strict settlement' without more is understood, in accordance with the common form of such instruments, to imply estates for life without impeachment of waste; in fact, the largest possible estate consistent with the preservation of the property in the family, comprising (as such settlements do in their ordinary form), the largest powers for jointures, portions, and the like, so as to make the tenant for life, as nearly as may be, owner, so far as that character can be separated

(1) 10 Sim. 576; 11 Sim. 508. (2) 1 H. & M. 775.

from the power of alienation." I must say that I think that some of those expressions, even as they appear in the authorized report, are somewhat too wide, and, probably, go rather beyond the meaning which the Lord Chancellor intended to convey. I do not believe that a case has ever occurred in which a mere direction to settle an estate on one for life with remainders over in strict settlement has been held to make the tenant for life unimpeachable for waste.

When the case of *Bankes* v. *Le Despencer* (1) is looked into, the principle of it is clear; there the estates were settled upon *Thomas Lord Le Despencer* and *Thomas Stapleton* successively for their lives, and they were made impeachable for waste, and after the death of the survivor the estates were to be strictly settled so as to go along with the dignity of *Le Despencer*, so long as the person possessed of the same dignity should be a lineal descendant of *Thomas Lord Le Despencer*. The object of the settlors was to carry the estate in a perpetual series of devolutions with the title; or, in other words, as the devolution of the title is the same as that of an estate tail, to create a perpetual estate tail or something like it. In order, therefore, to give effect to the general intention, it was necessary to cut down the estate of the first taker under the executory trust to a life estate, and it was on the ground that his estate was so cut down that he was made unimpeachable for waste.

The question before me is thus dealt with by the present Lord Chancellor in his judgment in *Davenport* v. *Davenport* (2): "All these authorities have this common quality, viz., that words importing a larger estate are cut down to an estate for life without impeachment of waste; but no case has been cited where an estate for life has had any addition made to it by the manner in which the Court has executed an executory trust." The general doctrine of the Court is, that where the executory trust is in such a form as would give the first taker an estate of inheritance, but the general object of the trust can only be effected by cutting down that estate to an estate for life, as in *Leonard* v. *Earl of Sussex* (3), and all that long line of cases referred to in *Fearne* on Contingent

(1) 10 Sim. 576; 11 Sim. 508. (2) 1 H. & M. 779. (3) 2 Vern. 526.

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Remainders, in which the general intention could only be effected by limiting estates to the issue as purchasers, there the life estates are made unimpeachable for waste. But no one could suppose that if a testator were to direct a settlement to be made on *A.* for life with remainder to his issue without adding the words "in strict settlement," *A.* would be impeachable for waste; but that if the testator had directed a settlement in precisely the same terms, but added the words "in strict settlement," *A.* would be unimpeachable of waste. On the contrary, in my opinion, the addition of the words "in strict settlement" would rather cut down than enlarge the measure of ownership to be allowed to the tenant for life.

To apply these principles to the present case. The direction here is to settle the estates in strict settlement upon the same trusts, &c., as the personal estate—that is to say, upon the testator's daughter and her sons successively for life, with remainders over. The testator, being the owner in fee simple of an estate in *Ireland*, has devised that estate to his daughter for life, with remainder to his grandson for life, with remainder to his first and other sons successively in tail male "in strict settlement," and has not made the tenants for life of that estate unimpeachable of waste; he has empowered his trustees to purchase land in *Ireland*, and, I think, he has clearly shewn by the devise of the Irish estate, what he meant in the executory trust by the words "in strict settlement," and that he intended that under the limitations of the estates to be purchased with his personal estate, the tenants for life should be in the same position as under the limitations which he has himself created of his Irish estate.

The result is, that construing this will not only by the general doctrine of the Court, but also by the particular language of the instrument itself, I must hold that the settlement is to be made in the same manner as in *Davenport* v. *Davenport* (1)—that is to say, that the tenants for life are not to be made dispunishable for waste. It was a very proper case to be argued, and the costs of all parties must be paid out of the corpus of the testator's estate.

I may add, that since the case was opened on the 30th of April, when counsel at my request furnished me with a list of the autho-

(1) 1 H. & M. 779. 10 Jur. N.S. 85

rities on which they intended to rely, I have had the opportunity of reading and considering them all.

V.-C. M.
1870
STANLEY
v.
COULTHURST.

Solicitors: Messrs. *Linklaters, Hackwood, & Addison;* Mr. *Hacon;* Messrs. *Farrer, Ouvry, & Farrer.*

LAMBE *v.* EAMES.

V.-C. M.
1870
June 27, 28.

Will—Construction—Trust or Absolute Interest.

A testator devised to his wife his freehold estate at *A.*, and all his personal property "to be at her disposal in any way she may think best for the benefit of herself and family":—

Held, an absolute gift.

JOHN LAMBE, by his will, dated the 13th of March, 1833, willed and bequeathed to his wife, *Elizabeth Lambe*, his freehold estate, situate and being No. 29, *Cockspur Street*, in the county of *Middlesex*, and also all his personal property, consisting of stock-in-trade, book-debts and household furniture, and property of every description belonging to him, the whole of the aforesaid property "to be at her disposal in any way she may think best for the benefit of herself and family."

The testator died in 1851.

Elizabeth Lambe, the widow, by her will, dated the 28th of February, 1857, devised "her freehold messuage No. 29, *Cockspur Street*," to *A. Chippendale* (who predeceased her), and *John Whitmore*, their heirs and assigns, upon trust, for her daughter *Elizabeth Eames*, for her life, subject to and charged with the payment of an annuity of £70 to her grandson, *Henry Lambe*, during the life of her daughter, and after the death of her daughter she directed the trustees to divide the rent between her grandchildren, *Henry Lambe* and *Charles Eames* (the son of *Elizabeth Eames*), in equal shares during their joint lives, and on the death of either of them, she devised the house to the longest liver of them, his heirs and assigns.

Elizabeth Lambe died in January, 1865, and *Elizabeth Eames* and her husband took possession of the house.

V.-C. M. 1870 LAMBE v. EAMES.

This was a suit by *Henry Lambe*, who was an illegitimate son of a son of *John* and *Elizabeth Lambe*, and was born in the lifetime of *John Lambe*, but after the date of his will, against *Elizabeth Eames* and her husband, and *Thomas Whitmore*, to enforce the payment of the annuity given to him by the will of *Elizabeth Lambe*.

The Plaintiff's right to the annuity was resisted by Mr. and Mrs. *Eames*, on the ground that under the will of *John Lambe*, *Elizabeth Lambe* could only dispose of the house for the benefit of herself and family, and therefore could not charge it with an annuity in favour of the Plaintiff, who, being illegitimate, was not one of the family.

Whitmore never acted as a trustee, and disclaimed after the institution of the suit.

Mr. *Cotton*, Q.C., and Mr. *Warner*, for the Plaintiff:—

Under the will of *John Lambe* his widow took an estate in fee simple in the house No. 29, *Cockspur Street*, and no trust was imposed upon her to dispose of it for the benefit of her family or the testator's family. The use of the word "estate" was sufficient to give her the fee, and the only question is, whether the words "to be at her disposal in any way she may think best for the benefit of herself and family" create either a trust, or a power in the nature of a trust. These words merely indicate the reason which induced the testator to give her the property, and do not cut down the gift. In *Brook* v. *Brook* (1), *Reeves* v. *Baker* (2), and *Howorth* v. *Dewell* (3), under very similar bequests, it was held that no trust was created. In all the cases, such as *Harding* v. *Glyn* (4) where powers have been held to be in the nature of trusts, the interest of the donee was plainly intended to be confined to his own life: Lord *St. Leonards* on Powers (5). Here the property was to be at the absolute disposal of the widow; she might have sold the house and spent the proceeds in paying her own debts if she thought that such a course would be most beneficial to herself and family. The uncertainty of the objects is fatal to the contention that this is a precatory trust: *Knight* v. *Knight* (6); *Williams*

(1) 3 Sm. & Giff. 280.
(2) 18 Beav. 372.
(3) 29 Ibid. 18.
(4) 1 Atk. 469.
(5) 8th Ed. p. 590.
(6) 3 Beav. 148.

v. *Williams* (1); *Webb* v. *Wools* (2); *Green* v. *Marsden* (3); *Alexander* v. *Alexander* (4).

Mr. *Bristowe*, Q.C., and Mr. *W. Barber*, for Mr. and Mrs. *Eames*:—

Elizabeth Lambe took the house under the will of *John Lambe*, upon trust for herself and family. No doubt the devise gave her a legal estate in fee, and probably she could have sold the house and given a good title to a purchaser, though it may be doubted whether her receipt for the purchase-money would have been a sufficient discharge; but she would have held the purchase-money upon trust for herself and family. It is not a case of a power in the nature of a trust, nor of a precatory trust, but of an imperative trust with a discretion as to the manner of executing it: *Crockett* v. *Crockett* (5); *Salusbury* v. *Denton* (6); *Woods* v. *Woods* (7); *Raikes* v. *Ward* (8); *Godfrey* v. *Godfrey* (9). The words in this will "to be at her disposal," &c., are quite as strong to create a trust as the words "to the intent that she may dispose," &c., in *Raikes* v. *Ward*. There is no such uncertainty in the word "family" as to prevent the Court from holding that there is a trust: *Woods* v. *Woods*. In *Brook* v. *Brook* (10) the devisee was a married woman, and the words there relied on as creating a trust, might have been only intended to exclude her husband's marital control; that case has been questioned: *Hawkins* on Wills (11). In *Howorth* v. *Dewell* (12) there was merely a power annexed to an absolute gift. In *Reeves* v. *Baker* (13) the trust (if any) was merely precatory, and the decision is inconsistent with *Shovelton* v. *Shovelton* (14), subsequently decided by the same Judge. In *Alexander* v. *Alexander* the context of the will shewed that a trust was not intended.

[They also referred to *Smith* v. *Smith* (15), and *Scott* v. *Key* (16).]

(1) 1 Sim. (N. S.) 358.
(2) 2 Ibid. 267.
(3) 1 Drew. 646.
(4) 2 Jur. (N. S.) 898.
(5) 2 Ph. 553.
(6) 3 K. & J. 529.
(7) 1 My. & Cr. 401.
(8) 1 Hare, 445.
(9) 2 N. R. 16.
(10) 3 Sm. & Giff. 280.
(11) Page 162.
(12) 29 Beav. 18.
(13) 18 Ibid. 372.
(14) 32 Ibid. 143.
(15) 2 Jur. (N. S.) 967.
(16) 35 Beav. 291.

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The contention of the other side requires the Court to reject all the words of the will after the gift to the testator's wife.

Mr. *Heath*, for *Whitmore*.

Mr. *Cotton*, in reply:—

In *Crockett* v. *Crockett* (1) the only gift to the wife was in the direction that the property should be at her disposal for herself and children. In *Raikes* v. *Ward* (2) the words "to the intent," were sufficient to create a trust, and the objects of the trust were the "children." In *Godfrey* v. *Godfrey* (3) the words "to be used for her own and her childrens' welfare," were much stronger than the words in the present case. Here the words "for the benefit of herself and family," must be read in connection with the immediately preceding words "she may think best," and not in connection with the words "to be at her disposal."

SIR R. MALINS, V.C.:—

14 Jeff Cas 324

The testator, *John Lambe*, was absolutely entitled to personal property, and seised in fee of a freehold estate, No. 29, *Cockspur Street*. He had a wife and children, and the question is, whether he has intended by his will to give all his property to his wife, leaving her to dispose of it as she should think proper, or whether he intended to make her tenant for life, and throw the obligation upon her of disposing of the property in favour of herself and his family after her death. The words are very short: "I, *John Lambe*, do will and bequeath to my wife *Elizabeth Lambe* my freehold estate, situated and being No. 29, *Cockspur Street*, and also all my personal property, consisting of stock-in-trade, book debts, household furniture, and property of every description belonging to me"—if the will had stopped there, it is admitted, that though the will was made in 1833, before the *Wills Act*, the word "estate" is sufficient to pass the fee simple of the house. If it had stopped there the fee simple of the house is given to the widow, and an absolute interest in the personal property. There is no attempt to make her tenant for life, but it is given to her absolutely; but

(1) 2 Ph. 553. (2) 1 Hare, 445.
(3) 2 N. R. 16.

then he proceeds, "the whole of the aforesaid property to be at her disposal in any way she may think best for the benefit of herself and family."

Now, what did he mean by these words? I suggested whether she could not have sold the house, and whether any purchaser to whom she had sold the house could have objected to the title on the ground that she was not tenant in fee. The Defendant's counsel admitted that it was impossible that any such objection could have been made to the title, because she had the fee simple vested in her, and she was to dispose of it in any way she thought best for the benefit of herself and family, and if she thought it best for the benefit of herself and family to dispose of the house and personal property, she might do so.

Then what does the testator mean by "family?" He does not say "my family;" does he mean her family or his own family? Who can say which it may mean? Perhaps it would be said by both sides that it means his own family, but it is not said so. I should rather think it means her family. What is the object of the testator? If he were now alive, and I could ask him what his meaning was, I have no doubt what the result of the inquiry would be. But I must ascertain his intention, as well as I can, from the words of the instrument. And I have no doubt whatever upon the whole will that it was the intention of the testator to leave the property at the absolute uncontrolled disposal of the wife, for her to dispose of it for her benefit, or to deal with it as she pleased. She might give it to the family if she thought proper, but she was under no obligation to do so. That, I am perfectly clear, was the intention of the testator.

What are the principles of law applicable to this case? I am bound to say that the modern decisions tend—and I think most reasonably tend—not to fetter the exercise of this kind of discretion, because the three cases cited by Mr. *Cotton*, of *Brook* v. *Brook* (1); *Reeves* v. *Baker* (2); and *Howorth* v. *Dewell* (3), are all cases in which the expressions were very much stronger against an absolute gift than they are here, and yet in every one of them the Court held that the gift was absolute.

(1) 3 Sm. & Giff. 280. (2) 18 Beav. 372. (3) 29 Beav. 18.

V.-C. M. 1870 LAMBE v. EAMES.

In *Brook* v. *Brook* (1), the testator devised a messuage to his niece *Mary Ann Brook*, "to be her sole and separate property, and quite independent of the debts or liabilities and control of her said husband." Stopping there it was clearly an absolute gift to her. The only question was, whether the absolute gift was cut down by these words which were added, "with power for the said *Mary Ann Brook* to appoint the same to her children and her husband in such a way and in such proportions as she may think fit." Of course, it was there argued that although the word was "power," the meaning was that at all events it was after her death to go to the children and husband. On the other hand, it was argued that it was merely giving to her the additional power, added to the fee simple. [His Honour read the passage in the judgment in *Brook* v. *Brook* (2), beginning "but there is no case," and ending, "incident to the gift to her of the fee simple," and continued:—] The words of that judgment are entirely applicable to the present case. There is here no indication of any wish or intention of the testator that the objects of the power should take anything except through the voluntary appointment of the person to whom he has given the estate. [His Honour, after referring to the cases of *Reeves* v. *Baker* (3), and *Howorth* v. *Dewell* (4), continued:—] I apprehend that wherever the will begins with an absolute gift, in order to cut it down, the latter part of the will must shew as clear an intention to cut down the absolute gift as the prior part does to make it.

Now, with regard to the cases which are mainly relied upon by the Defendants: *Raikes* v. *Ward* (5), I think, when it is looked at, is of a very different nature. In the present case, look at the indefinite nature of the intention, if intention there be, to create any trust. It is "to be disposed of as she thinks fit for the benefit of herself and family." In *Raikes* v. *Ward*, it is: "I give to my dear wife, *Marianne*, all my moneys, securities for money, goods, chattels, and personal estate whatsoever, to the intent"—making it absolutely imperative upon her. She has no choice to exercise; it is positive—"to the intent that she may dispose of the same for

(1) 3 Sm. & Giff. 280.
(2) Ibid. 282.
(3) 18 Beav. 372.
(4) 29 Ibid. 18.
(5) 1 Hare, 445.

the benefit of herself and our children in such manner as she may deem most advantageous." The only point decided by Sir *James Wigram* is, that the children have some interest. He does not decide what extent of interest; on the contrary, he suggests that the illusory appointment Act applies, and that the smallest coin in the realm might be sufficient to satisfy the trusts for those children. So it might have been here if there had been a trust. The lady might have given the smallest possible sum to the family, and might have taken all the residue to herself. *Crockett* v. *Crockett* (1) is also a case which has, when examined, no real application to this case. The words of the will in that case are: "Be it known to all that this my last desire is that all and every part of my property shall be at the disposal of my most true and lawful wife, *Caroline Crockett*, for herself and children." The sole question there was, was she absolutely entitled to everything, or was it for herself and her children? It should be borne in mind that the objects there were the children of the testator, and not, as in the present case, indefinitely "the family," or the family of the wife. There, I think, the obvious intention of the testator was, that the wife and children were all to share in the property.

Woods v. *Woods* (2) is a very peculiar case, for after giving his wife certain benefits the testator says: "All the overflush to my wife towards her support and her family, if any there be, after paying my brother for his trouble, and all other debts whatsoever." The question there was, whether the wife had the sole benefit, or whether there was a benefit for her children; and all that was decided was, that all the children had an interest, and that they could maintain the suit, because it was "for the support of herself and family"—that means "children"—and therefore all the children had an interest.

The case of *Salusbury* v. *Denton* (3) clearly falls within the first class of cases I have mentioned, where the property was to be at the disposal of, but without giving any benefit whatever to, the legatee.

The last case that was mentioned, *Godfrey* v. *Godfrey* (4), does, at first, look rather adverse to the construction I am putting on

(1) 2 Ph. 553.
(2) 1 My. & Cr. 401.
(3) 3 K. & J. 529.
(4) 2 N. R. 16.

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this will. There the words are: "Furthermore, it is my dying wish that the property which I now bequeath to my wife shall be used as to her seemeth best for her own and her children's welfare." All that the Vice-Chancellor decided in that case on demurrer was, that the children had an interest. The extent of their interest was left altogether undecided; but they clearly had an interest, because, when the testator says, "It is my wish that the property which I now bequeath to my wife shall be used as to her seemeth best for her own and her children's welfare," the objects of the gift are the wife and children.

Now, these cases seem to me not to apply to the present case. The first three cases, *Brook* v. *Brook* (1), *Howorth* v. *Dewell* (2), and *Reeves* v. *Baker* (3), are, in my opinion, the cases applicable to the present, so far as cases are necessary.

It appears to me to be perfectly clear that the intention of the testator in beginning with an absolute gift to his wife, and going on to say that it was to be at her will and disposal in any way she might think fit for the benefit of herself and family, was not an intention to cut down the absolute gift, but that the subsequent words were rather intended as a hint to her, which was not intended to be obligatory upon her.

I am, therefore, of opinion that the widow took the fee simple in the real property, and an absolute interest in the personal property. The consequence is, that she had a complete testamentary power over it, and she has effectually given this annuity to the Plaintiff which he now seeks to establish in this suit.

Solicitor for the Plaintiff: Mr. *Dubois.*

Solicitors for the Defendants: Messrs. *Rogers, Jull, & Rogers.*

(1) 3 Sm. & Giff. 280. (2) 18 Beav. 372. (3) 29 Beav. 18.

RICHARDSON *v.* YOUNGE.

V.-C. M.
1870
April 26.

Mortgage—Redemption—Joint Mortgagees—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *s.* 28.

Upon a bill filed to redeem a mortgage where two joint mortgagees had been in possession for more than twenty years:—

Held, that an acknowledgment by one only of the two joint mortgagees did not entitle the mortgagor to redeem.

THIS was a redemption suit, and the question was whether, where the mortgagees, who had lent money on a joint account, had been in possession for more than twenty years, an acknowledgment by one of such mortgagees, of the Plaintiff's title, was sufficient to take the case out of the 28th section of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), it being admitted that, but for such acknowledgment, the equity of redemption was barred.

The mortgage was originally created by an indenture dated in 1834, and by virtue of several transfers, the last of which was dated in 1843, the mortgage debt and legal estate in the mortgaged premises known as the *Hermitage* property became vested in the Defendants *Younge* and *Wilson* as joint tenants upon certain trusts, the money advanced by them being trust-money, and advanced on a joint account.

The bill was filed in 1868.

In 1845 the Defendants entered into possession and into the receipt of the rents and profits of the mortgaged premises.

In 1853 the Plaintiff, being desirous of redeeming the mortgage, applied to the Defendant *F. W. Wilson*, who was a solicitor, and requested him to furnish an account of his receipts and payments in respect of the mortgaged premises, and the amount due thereon, which the Defendant *Wilson* virtually promised to do.

The Defendant *Wilson* not having furnished such account the Plaintiff wrote to him and received, in reply, the following letter:—

"*Sheffield*, October 28, 1853.

"Dear Sir,—The lady, as was anticipated, has made her appear-

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ance, and search and inquiry are being made into the *Hermitage Street* accounts, so that you may shortly expect to hear definitely on the subject.

"I am, Sir, faithfully yours,

"*Fredk. Wm. Wilson.*

"Mr. *James Richardson.*"

And, in reply to another letter from the Plaintiff, the Defendant, on the 19th of January, 1854, wrote to the Plaintiff:—

"I am engaged upon this preparatory to a journey to *London*, on my return from whence I will write you as to what is arranged." And, again, on the 24th of May, 1854, the same Defendant wrote:—

"I now write to inform you that I have bestowed much pains to obtain a proper account, but have not been successful, wherefore we shall have to resort to some such mode of settling the matter as that which you proposed."

This referred to a proposal the Plaintiff had made, that if the mortgagees could not make out a proper account, they should go by his (the Plaintiff's) book.

The Plaintiff having proposed coming to *Sheffield* to meet the Defendant *Wilson*, the same Defendant, on the 31st of May, 1854, wrote to the Plaintiff:—

"I regret that you should propose a visit here at the time you mention, being very, very desirous that when you come an end may be made of all questions concerning the *Hermitage* property."

The Plaintiff went to *Sheffield* in July, 1854, when *Wilson* produced a book containing entries respecting the mortgage property, from which the Plaintiff made extracts with the Defendant *Wilson's* permission.

The Plaintiff relied on the above letters as an acknowledgment of his title.

Mr. *Glasse*, Q.C., and Mr. *Freeman*, for the Plaintiff:—

This is a case of the first instance, and is not touched by authority. The first question is, whether there has been a sufficient acknowledgment of the mortgage within the 28th section of the *Statute of Limitations* (3 & 4 Will. 4, c. 27). The letters set forth

in the bill are, we contend, sufficient to prove acknowledgment. Mr. *Wilson* says distinctly, that he has bestowed much pains to obtain a proper account, but has not been successful, wherefore they will have to resort to the mode pointed out by the Plaintiff; and afterwards he says he is very desirous that an end may be made of all questions concerning the *Hermitage* property. These passages are sufficient acknowledgment of the Plaintiff's right to redeem, and they bring the case within the authority of *Hodle* v. *Healey* (1), *Trulock* v. *Robey* (2), and *Stansfield* v. *Hobson* (3).

Then, if we shew an acknowledgment, the case is clearly within the 28th section of the statute, which provides that a mortgagor shall not bring a suit to redeem his mortgage but within twenty years, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor in writing, signed by the mortgagee; and when there shall be more than one mortgagee, such acknowledgment signed by one or more of such mortgagees shall be effectual only as against the party or parties signing as aforesaid, but shall not operate to give a right to redeem as against the persons entitled to any other undivided or divided part of the money or land.

The acknowledgment by *Wilson* is the acknowledgment by one of two mortgagees, and it binds both of them as they are seised *per my et per tout.* We are, therefore, entitled to an account, and to a reconveyance of the property upon payment of mortgage money and interest; or, under any circumstances, we are entitled to a reconveyance of a moiety of the premises as against *Wilson.*

Mr. *Cotton,* Q.C., and Mr. *C. Walker,* for the Defendants:—

The letters referred to in support of an acknowledgment of the Plaintiff's right to redeem cannot be said to constitute an admission. On the contrary, Mr. *Wilson* shews his ignorance of the matter, and merely states that he has made inquiries and taken much pains to obtain a proper account, but this is no acknowledgment. The utmost it amounts to is that, if the Plaintiff is entitled to an account, some means must be resorted to of supplying what there is no evidence to prove. Then, as regards the statute,

(1) 6 Madd. 181. (2) 12 Sim. 402.
(3) 16 Beav. 236.

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the exception in the 28th section could never have been intended to apply to a case like this, where there are two mortgagees who are joint tenants. If an account should be taken against one it will not bind the other who has made no acknowledgment, and the Plaintiff cannot have a reconveyance of the whole of the estate. He can be entitled only to a reconveyance of an undivided moiety, but yet he must pay the whole of the mortgage-money. The statute, therefore, could only have been intended to apply to mortgagees who have separate interests, and who can convey the whole of an estate upon an account taken against each separately.

Mr. *Glasse*, in reply.

SIR R. MALINS, V.C.:—

This case raises a question of great difficulty, and it is admitted that there is no authority upon the point. The mortgagees have been in possession of this property, at all events, from the year 1845, if not from the year 1840. They have, therefore, been either twenty-five or thirty years in possession, that is twenty-eight or twenty-three years before the filing of the bill, and in any case that period is binding upon the Plaintiff, unless he can bring himself within the exception in the 28th section of the *Statute of Limitations* by proving an acknowledgment of his title as mortgagor within twenty years. In order to prove an acknowledgment of his right to redeem, certain letters have been read which the Plaintiff received in 1854 from Mr. *Wilson*, a solicitor, one of the joint mortgagees, who, upon being applied to by the Plaintiff, entered into a correspondence with him upon the subject of this mortgage. There were altogether four letters, and the first question is whether, assuming *Wilson* to have been the sole mortgagee, these letters would be sufficient acknowledgment of the Plaintiff's right as mortgagor; and but for the decisions which have been cited on behalf of the Plaintiff, and particularly the case of *Hodle* v. *Healey* (1), I should have been of opinion that the letters are too vague to prove any acknowledgment. But looking at that decision, as well as the case of *Trulock* v. *Robey* (2) which was decided by the Vice-Chancellor of England in 1841, I feel bound

(1) 6 Madd. 181. (2) 12 Sim. 402.

to come to the conclusion that the letters are sufficient to amount to an acknowledgment by *Wilson* of the Plaintiff's right of redemption. On that part of the case, therefore, I am in favour of the Plaintiff's claim, that there is sufficient acknowledgment of right within the statute. But when it turns out that *Wilson* is one of two mortgagees advancing the money upon a joint trust account, there arises a very different question. The point, therefore, is, whether, when the acknowledgment is by one only of the two trustees, it amounts to a sufficient recognition of the Plaintiff's right to entitle him to a reconveyance of the mortgaged property. The acknowledgment by *Wilson* can only bind him so far as he has a right to reconvey, and then only upon having an account taken against him and upon payment of all that is due for principal and interest upon the mortgage, but then comes the question how much of the estate has *Wilson* the power of conveying. There has been no acknowledgment of the Plaintiff's right to redeem by the other trustee, and no account can be taken against him. All that *Wilson* would be able to convey would be an undivided moiety, because he is a joint trustee with *Younge;* but is *Wilson* bound to take half the mortgage money upon the conveyance of half the estate? It appears evident to me that the mortgagor can only redeem upon payment of all that is due upon the mortgage for principal, interest, and costs; but, assuming his right to redemption, that view of the case would not suit the Plaintiff if he could only have a reconveyance of half the estate. The question then is, whether such a right of redemption is of any value at all. It is only by taking an account against the mortgagee in possession that the amount payable by the mortgagor can be ascertained, and if the Plaintiff is entitled to redeem, the account must be taken against *Wilson* alone as the mortgagee in possession. This might well be carried out in a case where there were several mortgagees, and where the accounts could be taken against one mortgagee without affecting any other mortgagee who had not acknowledged the mortgagor's right; but what is to be the effect of taking the account where there are two joint mortgagees of the estate, when on the face of the mortgage deed it is admitted that the mortgage is held on a joint trustee account; and what is the effect of this statute which has, I think, omitted the precise case of

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the acknowledgment by one of two joint mortgagees, where there cannot be a reconveyance by both of the mortgagees? The money is clearly due to the two jointly, and if the intention of this statute was that where there are two joint trustees holding the mortgage, an acknowledgment by one binds both, that is not expressed by the 28th section. *Wilson*, who has given the acknowledgment, is not the mortgagee, but *Wilson* and *Younge* are together the mortgagees.

I think, considering that this mortgagor has been out of possession for twenty-five years, without any acknowledgment of the right of the Plaintiff or of those under whom he claims, beyond the letters set forth in the bill, it is a case in which the strictest construction of the Act should be applied. The Plaintiff knows that the two trustees have a joint interest, and that the two jointly are mortgagees, and is there any injustice in holding that where there are two or more joint mortgagees you must have an acknowledgment from all? It appears to me to be free from doubt, and looking at the object of the statute, I think the best interpretation is, that if a mortgagor desires to redeem against two persons jointly interested in a mortgage he must obtain the written acknowledgment of both. If it were otherwise, and if when there are two joint mortgagees you could redeem against one only, that would amount to a positive absurdity.

I come, therefore, to the conclusion that the proper construction of the words of the 28th section, "That where there is more than one mortgagee, the acknowledgment of one of such mortgagees shall be effectual only against the party signing the acknowledgment," are directed to the case of several mortgagees where an account taken against one will bind his interest but not the interest of any other person. But where the mortgage is to secure money to two or more persons jointly, there must be an acknowledgment by all. The Plaintiff, therefore, does not prove sufficient acknowledgment to take the case out of the statute, and consequently the bill must be dismissed. But, considering the novelty of the case, I think justice will be met by dismissing it without costs.

Solicitor for the Plaintiff: Mr. *F. F. Jeyes.*
Solicitor for the Defendants: Mr. *W. M. Wilkinson.*

WEBB *v.* HUGHES.

V.-C. M.
1870
May 4, 9.

Specific Performance—Contract for Sale—Time the Essence of the Contract—Waiver—Property required for Residence.

Upon a contract for the sale of a house and land required for immediate residence, the conditions were that the purchase should be completed at noon on the 26th of February, on which day the purchaser, having paid his purchase-money, was to be entitled to possession; but if, from any cause whatever, the purchase should not then be completed, the purchaser was to pay interest on the purchase-money from that day until the completion; and if any objections or requisitions as to title should be made upon the delivery of the abstract which the vendor should be unable or unwilling to remove, then the vendor was to be at liberty to cancel the contract. The vendor failed to complete his title by the day named; but negotiations were continued till the 7th of April, on which day notice was given by the purchaser of immediate abandonment of the contract. Upon bill filed by the vendor for specific performance:—

Held, that as a possible postponement of completion of the contract was contemplated by the terms of the agreement, time was not of the essence of the contract, and that if it had been so the purchaser, by continuing the negotiations as to title after the day fixed for completion, had waived it, and could not rescind without reasonable notice.

Decree for specific performance, with the usual inquiry as to title.

THIS was a bill for the specific performance of an agreement entered into on the 13th of February, 1869, by the Plaintiff, *J. M. Webb*, for the sale to the Defendant, *H. M. Hughes*, of a dwelling-house with outbuildings and two acres of land adjoining, known as *The Cedars*, for the sum of £1400. By the conditions of sale, it was stipulated that a deposit should be paid upon the Defendant signing the agreement, and that the remainder of the purchase-money should be paid and the purchase completed at noon on the 26th of February next; and if, from any cause whatever, the purchase should not then be completed, the purchaser should pay to the vendor interest, after the rate of £5 per cent. per annum, on the remainder of the purchase-money from that day until the completion of the purchase; the purchaser (having paid his purchase-money) should be entitled to the possession of the property on the 26th day of February next, all outgoings up to that day being cleared by the vendor. The vendor was to deliver an abstract of title within ten days, and there were restrictions as to the re-

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quirements which the purchaser was at liberty to make. All objections and requisitions (if any) in respect of the title were to be made in writing within twelve days from the delivery of the abstract; and if any objection or requisition should be made which the vendor should be unable or unwilling to remove or comply with, the vendor was to be at liberty to annul the contract, and in such case the deposit-money was to be repaid within one week.

The Defendant by his answer stated that an abstract of title was delivered to his solicitor on the 17th of February, but such abstract being incomplete, the further abstract, with copies of the plans referred to, was not delivered till the 6th of March, whereas he was bound by the agreement to deliver a complete abstract within ten days from the date of the agreement. That the Plaintiff had never yet shewn a good title to the whole of the property comprised in the agreement; that is to say, he had not shewn a good title to one portion of the land, containing about $21\frac{1}{2}$ perches, which was absolutely necessary for the enjoyment of the property; and the Defendant believed that a title to such piece of land could not now be made out by the Plaintiff. The Defendant further stated that he attained the age of twenty-one on the 24th of September, 1868, and at the time he entered into the agreement he was in want of a residence for himself and his mother, who resided with him; and his object was, as he informed the Plaintiff, to occupy the house and premises (which were then in the occupation of the Plaintiff) as a residence, and (as he informed the Plaintiff) he required immediate possession thereof; and he intended to occupy the same and take possession (as he was informed by the Plaintiff he could do) on the 26th of February, 1869, the day fixed by the agreement for completion of the purchase, and immediately to add to and improve the house and premises. But he was unable to take possession in consequence of the Plaintiff's neglect to deliver a complete abstract and to shew a good title to the whole of the property within the time prescribed by the agreement; that he was, therefore, put to great inconvenience and expense, and he submitted that, under the circumstances, time was of the essence of the contract, and that he was justified in refusing to complete the agreement.

On the 17th of March, 1869, the Defendant's solicitors sent

requisitions on the title, and on the 29th of the same month the Plaintiff's solicitors replied to such requisitions. On the 7th of April the Defendant's solicitors wrote to the Plaintiff's solicitors, stating that the answers to the objections to title had been laid before counsel, who considered that the small piece of 21½ perches of land was not comprised in the words describing the parcels which were inconsistent with the plan, and that no explanation would be sufficient to make the parcels consistent therewith; and he was of opinion that the vendor's title to this land was not such as the purchaser could be called upon to accept, and that the vendor had failed to make a good title. Under these circumstances, they requested that the deposit of £100, with interest, might be at once returned, together with £20 15*s.* 8*d.*, the amount of expenses incurred about the investigation of the title.

On the 20th of April, the Defendant's solicitors wrote again, stating that unless the deposit, with interest and expenses, was paid by a day therein named, proceedings would be commenced for the recovery thereof.

In consequence of the Plaintiff's solicitors refusing to comply with the request contained in the above letters, an action was commenced by the Defendant against the Plaintiff on the 26th of April, in the Court of Queen's Bench, for the recovery of the deposit with interest and costs, and the Defendant thereby claimed payment of £200.

By an order in this cause made on the 3rd of June, 1869, further proceedings in the action were stayed upon the Plaintiff paying into Court the amount claimed.

The Plaintiff in one affidavit stated that he had informed the Defendant he could take possession of the premises on the 26th of February if the purchase was completed by that time, but not otherwise.

This bill was filed on the 26th of May, 1869, and since then the Plaintiff's solicitors had forwarded a further abstract to the property in question without admitting that a good title had not been already shewn; and evidence was put in to prove the identity of the parcels, and the Plaintiff's title to the piece of land alleged to have been omitted in the plan accompanying the abstract.

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Mr. *Osborne*, Q.C., Mr. *G. N. Colt*, and Mr. *Platt*, for the Plaintiff:—

There is no ground for contending in this case that time is of the essence of the contract. It is true there was a day fixed upon which possession was to be given, but in *Boehm* v. *Wood* (1) there was an undertaking to deliver an abstract and to give possession on a particular day named, and yet it was held that this did not make time of the essence of the contract. The Defendant had notice, when the abstract was first delivered, that there was a difficulty in identifying the parcels; he ought therefore to have given notice at once if he intended to abandon the contract. This was laid down in *Flint* v. *Wooddin* (2), and that the purchaser, by going on negotiating after the day fixed for completion, had waived his right to insist upon time being of the essence of the contract. It will be definitive only in cases where it can be collected, from the terms of the contract, that the parties intend that the time shall be strictly adhered to; but where the agreement contains a stipulation that the abstract shall be delivered immediately, and if the purchase is not completed on a day named the vendor shall be entitled to interest until completion, then, if the parties negotiate on the subject of the title after that day, the benefit of the stipulation as to time is lost: *Hipwell* v. *Knight* (3); *Seton* v. *Slade* (4). The rule was laid down in *McMurray* v. *Spicer* (5), that after negotiations had gone on, it was necessary for the purchaser to give a reasonable time for putting an end to his contract, and in that case a week was held not to be a reasonable time. In this case the objection to title was of a very trivial nature, being merely the identification of a small piece of land which had been taken in from a common; and it has now been cleared up by the evidence of the witnesses who have made affidavits, and the purchaser's solicitor has been furnished with evidence of a complete title.

Mr. *Glasse*, Q.C., and Mr. *Nalder*, for the Defendant:—

Our objection is not in the nature of an objection to title. We believe that the vendor cannot make a good title to this piece of

(1) 1 Jac. & W. 419.
(2) 9 Hare, 618.
(3) 1 Y. & C. Ex. 401.
(4) 7 Ves. 265.
(5) Law Rep. 5 Eq. 527.

land, but that will be a matter for inquiry upon a reference, if the Plaintiff can enforce his contract. This case rests upon the decision in *Tilley* v. *Thomas* (1), where it was held, reversing the judgment of Vice-Chancellor *Stuart*, that where a purchaser is in want of a house for immediate residence, and on that ground a time is specified for his taking possession, then time is of the essence of the contract. In that case the vendor tendered possession on the day fixed, but failed to shew a good title. The Defendant had special reasons for requiring possession of this house on a particular day, and informed the Plaintiff of that fact; the consequence has been that, not being able to get possession, he has been put to great expense and inconvenience in procuring another residence. The importance as to the stipulation in regard to time is differently construed in Courts of law and equity, as we find it stated in *Roberts* v. *Berry* (2), and when time is not shewn distinctly to have been important, the Court will relieve the vendor against a lapse of time; but here the circumstances all tend to shew that time was an essential ingredient in the contract, and that the Defendant agreed to purchase the property for the express purpose of taking immediate possession of it as a residence. The Defendant was fully justified in refusing such a title as this. It is not a trifling matter that a good title was not shewn to this piece of land, for though but a small portion of the property, it is proved to have been essential to the enjoyment of it. A purchaser is entitled to such a title as he can force upon a repurchaser from himself at any future period, as was decided in *Magennis* v. *Fallon* (3).

SIR R. MALINS, V.C.:—

This bill was filed for the specific performance of the contract for sale of *The Cedars* on the 26th of May, 1869. The case set up by the Defendant is that time, if not by the terms of the agreement, at all events by the circumstances of the case, was of the essence of the contract. One stipulation in the agreement was that the Plaintiff should have possession of the property on the 26th of February if his purchase-money was then paid.

The circumstances were these:—The Defendant came of age in

(1) Law Rep. 3 Ch. 61. (2) 3 D. M. & G. 284.
(3) 2 Moll. 561.

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the year 1868, and required a residence immediately for himself and his mother. It is said that the Plaintiff was aware of that fact, and the Defendant says he informed the Plaintiff that if he could not obtain possession of the property by the time stated in the agreement, it would be of no use to him.

2 Ch D 349

Now, the rules of this Court are plain. A purchaser may, by the terms of the agreement, make time the essence of the contract, but it requires a very strict stipulation to effect that object; or he may make time the essence of the contract, by a notice at any time during the progress of the negotiations. If, therefore, time was not an essential part of the contract, the Defendant might have made it so by giving the Plaintiff notice to that effect. In my opinion, the agreement in this case did not make time the essence of the contract, because the very condition shews that the execution of the contract might from some causes be postponed, and, in that case, interest was to be paid upon the purchase-money until the completion of the purchase; but upon payment of the money, the purchaser was to be entitled to possession of the property. It was, therefore, evidently contemplated that the time might extend beyond the day fixed for completion. But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated. But, having once gone on negotiating beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shewn. What, then, would have been a reasonable time? What was the Defendant's position on the 7th of April? The solicitors had been negotiating from the 26th of February for completion of the contract, and on the 7th of April the purchaser does not give the vendor even twenty-four hours' notice of his intention, but sends a notice of his immediate aban-

donment of the contract. If, instead of that, he had given notice that if the vendor did not perfect his title within a reasonable time, then he would abandon his purchase and would require a return of his deposit, that would have been sufficient; but he had no right, under the circumstances, to give notice of immediate abandonment. *Taylor* v. *Brown* (1) is a case I often have occasion to refer to upon this subject. The rule was there laid down by Lord *Langdale*, that where the contract and the circumstances are such that time is not in this Court considered to be of the essence of the contract—in such a case, if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered in this Court.

In *McMurray* v. *Spicer* (2) I had occasion fully to consider the question, and there I stated (3): "The purchaser is bound to give the vendor a reasonable time for completing his title. No absolute rule can be laid down as to what is a reasonable time. That must depend upon a variety of circumstances. . . . The notice here was a week, which I think was too short a time. He was bound to give him a reasonable time, and I think that a week, or even a month, was too short; and the notice was ineffectual for the purpose of rescinding the contract, upon the ground of the time not being a reasonable time." On this rule, therefore, it was not competent for the purchaser to give notice of immediate abandonment of his contract.

In the course of the argument the case of *Tilley* v. *Thomas* (4) was cited in support of the Defendant's contention, but that was a totally different case. The stipulation there was that possession should be given on the 14th of January next, and the property was required for a residence. If the purchaser had gone on negotiating after the 14th of January, he could not have made time the essence of the contract; but he gave notice on that very day of his abandonment of the contract, on the ground that the title was not completed, and possession could not be given on that day, in pursuance of the agreement; so that the purchaser having made his stand on that very day, the decision was that time was of

(1) 2 Beav. 180.
(2) Law Rep. 5 Eq. 527.
(3) Law Rep. 5 Eq. 543.
(4) Ibid. 3 Ch. 61.

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the essence of the contract. It is true that negotiations had gone on after the day fixed for abandonment of the purchase, but these negotiations were entered into without prejudice to the purchaser's right, and the judgment depended on that fact. The decision, therefore, does not in any way trench upon the general rule, as it turned upon the purchaser making his stand on the very day fixed for completion.

In this case, if time had been of the essence of the contract, the purchaser might have given notice on the day appointed for completion that he would abandon the contract; but after going on negotiating, he should have given a reasonable notice.

It is my duty, therefore, to make a decree for specific performance, with the usual reference as to title; and the Defendant must pay the costs of the suit up to the hearing.

Solicitors for the Plaintiff: Messrs. *Braikenridge & Sons.*
Solicitors for the Defendant: Messrs. *Hedges & Stedman.*

V.-C. M. 1870 *March* 4; *April* 29; *June* 10.

In re BADART'S TRUSTS.

Succession Duty—16 & 17 *Vict. c.* 51—*Will*—*Legacy*—*Bequest in Trust for Persons in Succession*—*Foreign Domicil.*

A testator who was domiciled in *Belgium*, but for the last ten years of his life resided and carried on business in *England*, by his will directed a sum of £12,000 to be invested in Consols and held in trust for *A.* for life, with remainder for his nephews and nieces, most of whom were Belgians:—

Held, that upon the death of *A.* succession duty was payable on the £12,000.

In re Smith's Trusts (1) and *In re Capdevielle* (2) followed.
Wallace v. *Attorney-General* (3) distinguished.

FRANCIS JOSEPH BADART, by his will, dated the 2nd of February, 1865, appointed his brother, *Jean Joseph Badart* (with whom he carried on business in partnership), and *William Alexander Waller*, his executors, and bequeathed to his brother all his interest in the partnership business, provided his brother should,

(1) 12 W. R. 933. (2) 2 H. & C. 985. (3) Law Rep. 1 Ch. 1.

within three months after the testator's death, pay to his co-executor such sum as should be sufficient to pay the testator's private debts, funeral and testamentary expenses, and a legacy of £200, and a sum of £12,000; and he directed that his executors should invest the £12,000 in their names in consols, and should pay the dividends to *Adelaide Waterlot* for life, and after her death should sell the Consols, and stand possessed of the proceeds upon trust for the children of his two brothers and sister.

The testator was a native of *Belgium*, and lived in *Belgium* until about ten years before his death, when he came to *England*, being then about fifty years old; and from that time he resided and carried on business in *England*. But he frequently expressed an intention of returning to *Belgium*, and residing there; and on one occasion, having agreed to purchase land in *England* for the purpose of his business, but finding that he could not hold the land without obtaining a certificate of naturalization, he abandoned the purchase, and took a lease of the land for twenty-one years.

The testator died in 1868, and his will was proved in *England*. The £12,000 was paid by his brother, and invested in consols in the names of the executors.

Adelaide Waterlot died on the 18th of September, 1869, and thereupon the testator's nephews and nieces, eleven in number, of whom ten were domiciled in *Belgium* and one in *England*, having claimed to receive the trust fund free from legacy or succession duty, on the ground that the testator's domicil was Belgian, and the Crown having claimed legacy duty, the executors paid into Court, under the *Trustee Relief Act*, £360, being the amount of the duty, whether legacy or succession duty, on £12,000, and divided the rest of the fund among the nephews and nieces.

This was a Petition by the nephews and nieces for payment to them of the fund in Court.

Mr. *Pearson*, Q.C., and Mr. *Graham Hastings*, for the Petitioners:—

The testator's domicil of origin was Belgian, and he never acquired an English domicil. The law is clearly settled that the domicil of origin adheres until a new domicil is acquired, and that

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in order to acquire a new domicil there must be not only actual change of residence, but an intention of taking up a fixed and settled abode in the new country: *Bell* v. *Kennedy* (1). Here it is clearly proved that the testator always intended to return to *Belgium* and retain his Belgian domicil.

Then, if the testator's domicil was foreign, neither legacy duty nor succession duty is payable on personal property bequeathed by his will: *Thomson* v. *Advocate-General* (2); *Wallace* v. *Attorney-General* (3). In the latter case, Lord *Cranworth* decided that the generality of the words in the *Succession Duty Act*, under which the duty is imposed upon every person who becomes entitled to property on the death of another, must receive the same limitation as was placed by the House of Lords, in *Thomson* v. *Advocate-General*, upon the equally general words in the Legacy Duty Acts—namely, that the operation of the words must be confined to persons who become entitled to property by virtue of the law of *England;* and, consequently, persons becoming entitled to personal property under the will of a domiciled foreigner are not liable to the duty. The cases of *In re Lovelace's Settlement* (4), and *In re Wallop's Trusts* (5), were cases of testamentary appointments made by persons domiciled abroad under powers created, in the one case by an English settlement, in the other case by the will of an English testator. The appointees therefore took, not under the wills of the donees of the powers, but under the instruments creating the powers, which were English instruments, to be construed according to the law of *England*. In *In re Lovelace's Settlement* (6), Lord Justice *Turner* founded his decision on the fact that the property in question was not the property of Mrs. *Lovelace*, the donee of the power; and Lord Justice *Knight Bruce* (7) observed that the appointed property would, if she had not exercised her power of appointment, not have been part of her estate, but would have gone under the settlement to her next of kin, who would clearly have been liable to duty. The decision in *In re Wallop's Trusts* (8) was exactly the same as that of *In re Lovelace's Settle-*

(1) Law Rep. 1 H. L., Sc. 307.
(2) 12 Cl. & F. 1.
(3) Law Rep. 1 Ch. 1.
(4) 4 De G. & J. 340.
(5) 1 D. J. & S. 656.
(6) 4 De G. & J. 352.
(7) Ibid. 346.
(8) 1 D. J. & S. 671.

ment; and the *dicta* of Lord Justice *Turner* in that case, in which Lord Justice *Knight Bruce* evidently did not concur, as well as the decision of the Court of Exchequer in *In re Capdevielle* (1), founded upon those *dicta,* have been overruled by *Wallace* v. *Attorney-General* (2). The Judges who decided *In re Capdevielle,* doubted the correctness of the *dicta* in *In re Wallop's Trusts* (3), though they felt themselves bound to follow them.

Mr. *W. Karslake,* for the Crown:—

First, the testator's domicil was English; secondly, if his domicil was Belgian, succession duty is payable.

[The VICE-CHANCELLOR requested him to argue the second point first.]

This is not, as in *Wallace* v. *Attorney-General,* the case of a direct legacy given by the will of a person domiciled abroad, but the case of a trust fund distinct from the rest of the testator's property, directed to be invested in *England* in the names of trustees, one of whom was an Englishman, in trust for one person for life, with remainder in trust for other persons. The trustees ought to have executed a deed-poll declaring the trusts in accordance with the will. The *cestuis que trust,* therefore, take under English law, and upon the death of the tenant for life succession duty became payable: *In re Smith's Trusts* (4); that case decides that when a domiciled foreigner by his will creates a trust, and that trust is carried out in *England,* succession duty is payable.

The fund in question was not given directly by the testator, but was to be paid by his brother as the condition of the brother succeeding to the testator's business. This is, to use the words of Lord Justice *Turner* in *In re Lovelace's Settlement* (5), "a succession under a British settlement to British property, vested in British trustees, and falling under the jurisdiction of a British Court." The will is an English will, and the effect of the trust created by the testator was to bring the property under the protection of the law of *England.*

(1) 2 H. & C. 985. 10 Jur. N.S. 1155 (3) 1 D. J. & S. 656. 10 Jur. N.S. 328
(2) Law Rep. 1 Ch. App. 11 Jur. N.S. 957 (4) 12 W. R. 933.
(5) 4 De G. & J. 352. 5 Jur. N.S. 696

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A legatee to whom an immediate legacy is given by the will of a domiciled foreigner does not seek the protection of an English Court; but where a trust fund is directed to be invested in English property in trust for one for life, with remainder over, the trust is brought under the jurisdiction of English Courts, and those who take in remainder are liable to succession duty. Therefore, these Petitioners claim under English law; and the case of *Wallace* v. *Attorney-General* (1) is in favour of the Crown, as well as the cases of *In re Lovelace's Settlement* (2), *In re Wallop's Trusts* (3), and *In re Capdevielle* (4).

The VICE-CHANCELLOR said that he would look into the authorities, and consider whether it would be necessary to go into the question of domicil.

April 29. SIR R. MALINS, V.C.:—

Mr. *Karslake*, the time which has elapsed since this case was last before me has given me the opportunity of looking at the cases; and although I do not profess to have read them all through, I do not think that it is necessary for me to trouble you any further. Whether this testator was a domiciled foreigner or not, it is admitted that he came to *England* from *Belgium*, traded here, was a resident merchant here, made his money here, made an English will, appointed executors, one of whom was an Englishman, and directed the investment of £12,000 in English consols, to be held in trust for a lady for her life, with remainder over to his nephews and nieces. The simple question is, whether the nephews and nieces are liable to pay succession duty. With the exception of the case of *Wallace* v. *Attorney-General*, which it seems to me was a case of legacy duty and not succession duty, I have not been able to find a single case in which it has not been held that under such circumstances succession duty was payable. In the case of *In re Smith's Trusts* (5) the very point was decided by Vice-Chancellor *Stuart*. Upon principle I agree with Vice-Chancellor *Stuart*, and therefore, subject to any observations which

(1) Law Rep. 1 Ch. 1. (3) 1 D. J. & S. 656.
(2) 4 De G. & J. 340. (4) 2 H. & C. 985.
(5) 12 W. R. 933.

Mr. *Pearson* may wish to make, I propose to hold, that even admitting the testator to have been a domiciled foreigner, admitting that if I had to decide the question as to the succession to his property, I must hold that the succession was according to the law of *Belgium;* yet as he was a resident here, and created an English trust, which must be construed according to English law, I must decide that succession duty is payable. I will hear Mr. *Pearson,* if he should think it necessary, though I much prefer to follow the decision of Vice-Chancellor *Stuart* without any further argument.

The case of *Wallace* v. *Attorney-General* (1) was the case of the will of a testator who was born in *France,* resided in *France,* and was a domiciled Frenchman; and it was a question whether the legacies given by his will were liable to duty. I cannot help thinking that in that case of *Wallace* v. *Attorney-General* some miscarriage has taken place, because it was a mere question of legacy duty; it was no succession, except so far as every legacy is a succession. Then I find, in *In re Capdevielle* (2), although two Judges had great doubts whether the domicil was not foreign, yet they concurred in considering that succession duty was payable; one of them, Mr. Baron *Bramwell,* also considered it a doubtful case, but he thought it was clear that succession duty ought to be payable, and he puts it very much as I do. He said that Mr. *Capdevielle* had resided thirty years in *England,* but the evidence was distinct that he intended to return to *France,* and he died almost with the declaration on his lips that he meant to go back to *France.* The evidence here is that Mr. *Badart* always intended to go back to *Belgium.* In that case all the four Judges concurred in thinking that the property was liable to succession duty, and the Court of Exchequer is the proper Court to decide such a matter. Then, in *In re Wallop's Trusts* (3) Lord Justice *Turner* most distinctly says, that it does not follow that because property is not liable to legacy duty, it is not liable to succession duty. Then, finally, there is the case, which I desire to follow, of *In re Smith's Trusts* (4). I think it is quite clear, upon every principle, that this gentleman's estate ought to pay the taxes of the country in which he lived. If a man makes his money in *England* he ought to pay

(1) Law Rep. 1 Ch. 1. 11 Jun 1857 (3) 1 D. J. & S. 656. 10 Jun 1858
(2) 2 H. & C. 985. 16 Jun 1855 (4) 12 W. R. 933.

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English taxes. The present case is even a stronger case for succession duty than *In re Smith's Trusts* (1), because there the testator was not only domiciled abroad, but resident abroad; and my judgment entirely concurs with that decision. I would rather follow it, and leave the Petitioners to take my decision and that of Vice-Chancellor *Stuart* to the Court of Appeal.

Mr. *Pearson* having expressed his desire to be heard in reply, the case was ordered to stand over for that purpose.

June 10. Mr. *Pearson*, in reply:—

This is a simple legacy and nothing more: a bequest to *A.* for life, with remainder to *B.*, is just as much a legacy as an immediate bequest to *A.* absolutely. Under 36 Geo. 3, c. 52, s. 12, such a legacy is considered so entirely one legacy, that, if the parties who take for life and in remainder are related in the same degree to the testator, the entire legacy duty must be paid at once on the testator's death. If this be a legacy, then, as the testator was a foreigner, the legacy, whether immediate or in remainder, is exempt from legacy duty; and upon the same principle, according to *Wallace* v. *Attorney-General* (2), a disposition of personal property by the will of a foreigner, by which persons became entitled, on the death either of the testator himself, or of any other person, does not come within the *Succession Duty Act.* The words of the 2nd section of that Act would apply just as well to an immediate absolute legacy as to a legacy out of which a life interest is carved; and in *Wallace* v. *Attorney-General,* Lord *Cranworth* admitted that the words of the Act, unless they were read with the implied restriction that they must be confined to persons claiming under English law, would apply to the case before him, which was that of an immediate absolute legacy. Here the Petitioners are entitled to the fund under the law of *Belgium:* the validity of the will, the construction of the will, the class of persons who are to take the fund, must be determined by that law. If there had been nephews or nieces of the testator, who were legitimate ac-

(1) 12 W. R. 933. (2) Law Rep. 1 Ch. 1.

cording to Belgian law, but illegitimate according to English law, they would have been entitled to a share in the fund; if the will had infringed the restrictions imposed by the law of *Belgium* on the power of testamentary disposition, it must have been set aside. The fact that the fund is to be invested in the English funds is immaterial, the trust being created solely by the will, and governed by Belgian law. It might as well be contended that trust funds held under a settlement made in a foreign country on the marriage of two foreigners, if invested in English funds, would be liable to succession duty. In the case of *In re Smith's Trusts* (1), the trust fund had been brought to *England*, and upon the appointment of new trustees a deed was executed in *England* by the trustees and *cestuis que trust*, by which the trusts were declared. The reasons for the decision in that case are not reported, but it must have been decided on the ground that the persons who were held liable to duty claimed, not under the will, but under the English deed; if they were treated as deriving their title under the will, the decision is inconsistent with, and was overruled by, *Wallace* v. *Attorney-General* (2). Here there has been no deed, and there was no necessity for a deed; the Petitioners simply claim a legacy under the will of a domiciled foreigner. The case of *In re Capdevielle* (3) is of no authority—the Judges do not seem to have agreed on any one point; and if it amounts to a decision that succession duty is payable on personal property in *England* bequeathed by the will of a foreigner, it is contrary to the subsequent decision in *Wallace* v. *Attorney-General*, which must be the governing authority in this Court.

[He also referred to *In re De Lancey* (4).]

SIR R. MALINS, V.C.:—

Having had an opportunity between the 4th of March, when the case was originally opened to me, and the 29th of April, when I expressed my impression upon it, of very maturely considering and reconsidering every authority cited, including all those mentioned by Mr. *Pearson*, except the case of *In re De Lancey*, which does

(1) 12 W. R. 933.
(2) Law Rep. 1 Ch. 1.
(3) 2 H. & C. 985.
(4) Law Rep. 4 Ex. 345; Ibid. 5 Ex. 102.

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not seem to affect the question at all, on the 29th of April I gave my decision, and I then fully expressed my opinion on the result of the cases. I am very glad I have heard Mr. *Pearson* upon the point upon which he desired to address me, and he has endeavoured to press upon me that this is in point of fact a legacy—as much, in fact, a legacy as in the case of Lord *Henry Seymour's* will in *Wallace* v. *Attorney-General* (1), which was a simple bequest of £24,000 by a domiciled Frenchman to charities in *England*. It was there decided by Lord *Cranworth*—and as it appears to me most properly decided—that no duty was payable, because it had been finally settled by the case of *Thomson* v. *Advocate-General* (2), in the House of Lords, that legacy duty is not payable upon legacies given by domiciled foreigners. Lord *Henry Seymour* was such a person, and therefore it is clear there was no legacy duty payable. There was no case of succession, because it was an immediate gift out-and-out, and could not upon any principle be called anything but a legacy. But the Government, having failed in the attempt to get the duty in the shape of legacy duty, made an attempt to get it in another shape—namely, by calling it succession duty. That attempt, however, signally failed, as I think it should have done.

Now this case, in my opinion, is very different. This is a legacy no doubt, and Mr. *Pearson* is correct in saying that it is a legacy, and that under the *Legacy Duty Act* (36 Geo. 3, c. 52), the duty would have been assessed upon it as a legacy, but it is a legacy to which there is a succession. I assume for the purpose of my decision that the testator was a domiciled foreigner. I will assume that his domicil of origin was Belgian; he came over to *England*, about twelve years before he made his will, as a trader; he made the bulk of his fortune by English trading; and he made a will by which he gave a trust fund of £12,000 to be invested in consols, in the name of two trustees—one his own brother, a domiciled foreigner, and the other the solicitor who prepared his will; and they were to pay the interest of those funds to a lady for life, and afterwards to divide the fund among his nephews and nieces, some of whom are resident in *Belgium*, and one in *England*. The tenancy for life has expired, and the simple question is, whether

(1) Law Rep. 1 Ch. 1. (2) 12 Cl. & F. 1.

succession duty became payable on the death of the tenant for life, and the nephews and nieces succeeding to the property. The trustees have distributed the whole fund, minus the succession duty, which would amount to £360. They have paid the £360 into Court, which represents succession duty; and the contest is between the Crown, claiming that money as succession duty, and the nephews and nieces, claiming it as part of the legacy given to them, which they contend is not liable to succession duty.

It is not necessary for me to go fully into the cases which I have referred to before. The sum and substance of what I said on the former occasion was this, that I concurred in the decision of the Court of Exchequer in the case of *In re Capdevielle* (1), which was the case of a testator who was in the same position as this testator, except that his residence in *England* had been longer than that of this testator. This testator had resided in *England* about twelve years, when he died, and Mr. *Capdevielle* had resided in *England* twenty-nine years. He had made his money here, and this testator made his money here. The Court of Exchequer, all four Judges concurring in the judgment, decided that although his domicil was foreign, yet under the particular circumstances the property was liable to succession duty. Some of them doubted whether the domicil was English or foreign; but whatever doubts they entertained upon that point (and there was great difference of opinion on some of the points), all four concurred in the judgment that succession duty was payable.

Then a similar point came before Vice-Chancellor *Stuart* in *In re Smith's Trusts* (2), which is a much weaker case for succession duty than the present, because that was the case of a testator domiciled in the *Mauritius*, who made his will in the *Mauritius*, but who created a trust of a fund invested in English consols, to be paid to his wife for life, and afterwards to other persons. The question arose whether the property was liable to succession duty, and the Vice-Chancellor thought succession duty was payable. Finding that the Court of Exchequer—which is the proper tribunal to decide these questions, being the Court of Revenue—has decided in a case precisely similar to this, that succession duty is payable, finding that the Vice-Chancellor *Stuart* has decided in the same

(1) 2 H. & C. 985. (2) 12 W. R. 933.

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11 Eq 380

way, and, as I stated before, my own judgment concurring in that view, I think that under the particular circumstances of this case succession duty is payable. I decide that without in the slightest degree supposing that the property of any merchant resident abroad, who happens accidentally to be present in *England*, and makes his will (not applying that to such a case as this, where the man practically has become an Englishman), is liable to succession duty. I entirely concur in the observations made by Mr. Baron *Bramwell* in *In re Capdevielle* (1), that under such circumstances as these legacy duty ought to be payable. It is no hardship on these nephews and nieces that they have to pay succession duty. Therefore, that being the bias of my mind, and finding that two Courts—one of co-ordinate jurisdiction, and one which for this purpose I must regard as a higher jurisdiction—have decided the point, I follow their decisions; and I cheerfully do so, because my own judgment concurs entirely with them. Therefore I decide that succession duty is payable, and consequently the Crown is entitled to the fund in Court.

Solicitors for the Petitioners: Messrs. *W. & W. A. Waller.*
Solicitor for the Respondents: *The Solicitor of Inland Revenue.*

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14 Eq 511, -5

In re IMPERIAL LAND COMPANY OF MARSEILLES. *In re* NATIONAL BANK.

Companies Act, 1862, *ss.* 100, 165—*Misappropriation of Funds—Officers of the Company—Bankers.*

Upon a motion that the *National Bank*, and three of its directors, might be ordered to pay to the liquidators of the company a sum of £5000, alleged to have been improperly paid out of the funds of the company as an inducement to the bank to open an account with the company:—

Held, that the payment for opening an account with the banker was a misappropriation of the funds of the company, but that, as there was no direct proof that this money was paid by the company, the Court could make no order, upon a motion under the 100th section of the *Companies Act*, 1862, for its restoration; and the Court being of opinion that a banker was not an

(1) 2 H. & C. 985. 10 Jur. N.S. 1055

officer of the company within the 165th section of the Act, no order could be made under that section.

Leave given to file a bill against the directors.

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In re IMPERIAL LAND COMPANY OF MARSEILLES.

In re NATIONAL BANK.

THIS was a motion by the liquidators of the *Imperial Land Company of Marseilles, Limited*, that the *National Bank* and Sir *Joseph Neale McKenna*, *Harvey Lewis*, and *Frazer Bradshaw Henshaw*, formerly directors of the said company, might be ordered, jointly and severally, to pay to the liquidators the sum of £5000, being a sum belonging to the said company, which in or about and ever since the month of March, 1866, was and had been misapplied and improperly retained by the bank in connection with the promotion of the company, and which sum the bank was liable to account for and refund to the company, together with interest thereon, at the rate of £5 per cent. per annum, from the 26th day of March, or from such day as it should be shewn the bank received and retained the said sum; and in the event of the Court, from any technical reason, refusing to make such order on this application, then that the liquidators might have the sanction of the Court for taking such proceedings, at law or in equity, against the bank, or any other parties as Defendants thereto, for the recovery of the said moneys as they might be advised.

It appeared that the company was established in January, 1866, for the purpose of purchasing certain land at *Marseilles*, and it was arranged that this company should be brought out and floated with the assistance of a company called the *Crédit Foncier and Mobilier of England;* and thereupon contracts were entered into by *Albert Grant*, the managing director of the *Crédit Foncier*, on behalf of the *Land Company*, with the French vendors, for the purchase of various properties for the sum of £1,144,382. At the same time a contract was entered into by the *Land Company* with *John Masterman*, one of the promoters, for the purchase of the same properties for the sum of £1,807,633, being £663,251 over and above the amount to be paid by the *Crédit Foncier*, it being arranged between the parties that *John Masterman* was for this purpose to take a transfer of the property from the *Crédit Foncier*. The first meeting of the directors of the *Land Company* was held on the 24th of February, 1866, at which the three directors, *McKenna, Lewis*, and *Henshaw*, were present, and the purchase-deed was then approved

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of by the directors. The prospectus of the company was read and approved of at the same meeting, and was immediately issued to the public. In this prospectus the capital was fixed at £1,600,000, and the names of the directors were set forth: the list being headed by Messrs. *Albert Grant*, *Harris*, and *Warner*, who were described as directors of the *Crédit Foncier;* then followed the names of Colonel *James Holland* and Mr. *Sydney Stopford*, directors of the *Agra and Masterman's Bank*, and afterwards the names of Messrs. *McKenna*, *Lewis*, and *Henshaw*, described as directors of the *National Bank*. The prospectus further stated that applications for shares would be received by the *Crédit Foncier*, the *Agra and Masterman's Bank*, and the *National Bank;* that the *Agra and Masterman's Bank*, the *National Bank*, and the *National Bank of Liverpool*, would be the bankers of the company; that the temporary offices would be at Nos. 17 & 18, *Cornhill*, which was the office of the *Crédit Foncier;* and that *Alfred Lowe* (the then secretary of the *Crédit Foncier*) would be the secretary, *pro tem.*, of the *Imperial Land Company*. On the 26th of February, 1866, a further agreement was entered into by the directors with *John Masterman*, to the effect that a sum of £360,000, part of the purchase-money for the land at *Marseilles*, should be paid over to the *Crédit Foncier*, for their services in floating and bringing out the company, and this sum was, in fact, paid over to them in the month of April, 1866. On the day after the above meeting, the following letter was written by the secretary, *Alfred Lowe*, to the *National Bank:*—

"*Crédit Foncier and Mobilier of England, Limited.*

"Gentlemen,—I am directed to request that you will be good enough to open an account and receive the subscriptions for the shares of the *Imperial Land Company of Marseilles*. In consideration of the trouble you will have in this matter, the directors of the *Crédit Foncier* will pay you the sum of £5000, as your banking commission, within a fortnight after the due allotment of the shares above referred to."

This letter was, on the 27th of February, laid before a board-meeting of the *National Bank*, at which two of the Defendants, *Lewis* and *Henshaw*, were present.

An account was accordingly opened with the bank by the *Imperial Land Company*, and a balance ranging from £30,000 to

£70,000 was proved to have been standing to their credit down to the 29th of June, 1866, on which day the stipulated sum of £5000 was paid to the *National Bank*, by a cheque drawn by the *Crédit Foncier* upon their own account with the same bank.

The evidence on behalf of the applicants was directed towards proving that the £5000 so paid to the bank formed part of the £360,000 paid by the *Land Company* to the *Crédit Foncier*, or was otherwise the money of the *Imperial Land Company*.

On behalf of the defence the evidence proved that a sum of £20,000 was lent by the *National Bank* to the *Crédit Foncier*, on the 2nd of May, 1866, when their account was overdrawn, and that another sum of £30,000 was placed to their credit by the bank on the 29th of June, the day on which the cheque for £5000 was passed to the bnnk, leading to the inference that the latter sum was paid out of the £30,000. It was also stated in evidence that the £5000 was paid to the bank in order to induce them to use their influence in obtaining subscriptions of shares, and that a similar sum had been paid to the *Agra and Masterman's Bank* for the same purpose.

The further evidence related principally to the part taken by the directors of the bank in reference to the transaction, and the amount of information possessed by them upon the subject. This evidence will be found more particularly referred to in the judgment of the Vice-Chancellor.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the liquidators of the *Imperial Land Company*:—

The Court will have but little doubt, upon the evidence in this case, that the sum of £5000, paid to the *National Bank* for opening an account with them as bankers of the company, was a gross misapplication of the funds entrusted to the directors. It is proved that the account was one of a very lucrative kind, as it necessarily must have been. The average sum standing to the credit of the company at the bankers was not less than £30,000, which was money received by them from the public who came in and purchased shares. No banker would hesitate to receive such an account, and no banker would require payment for opening the account; therefore it was an unprecedented transaction. The

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only way of accounting for it is that three directors of the *Land Company* were also directors of the bank. Then, again, three other directors of this company were also directors of the *Crédit Foncier;* and as we find such enormous sums scattered about among those who had any hand in the promotion of the company, it is not to be wondered at that the *National Bank* should have come in for a share; but the Court will have to decide whether the payment of £5000 to the bank was or was not a misappropriation of the funds of the company. Then follows the question, by whom was the money paid? It is in evidence that £360,000 was paid to the *Crédit Foncier* as a promotion-fee for the part taken by them in what is called "floating" the company, and there is no doubt that the £5000 was paid to the bank by means of a cheque signed by the directors of the *Crédit Foncier;* but although there is no direct evidence that it was paid by the *Land Company*, there can be no doubt of that fact, and it must have been known to three at least of the directors of the bank. Even if it had been paid out of the £360,000, it was part of the moneys of the *Land Company*, and the promotion-fee would have been the less by that amount if the £5000 had not been paid to the bank. If the Court is satisfied that the payment was made out of the company's money, and that it was a misappropriation to that amount, then the Court has power, under the 165th section of the *Companies Act*, 1862, to make the directors repay the money, or (under the 100th section) to order the bankers to restore the money placed in their hands to which the company is entitled. The 165th section distinctly enables the Court to compel any past or present director, or any officer of the company, to repay money which has been misapplied, and the 100th section gives the Court power to require any banker, or agent or officer of a company, to give up any sum of money which happens to be placed in his hands to which the company is entitled. Although bankers are not mentioned in the 165th section, we submit that they are officers of the company within the meaning of that section, and that the Court has jurisdiction over them upon a summary application of this nature, and we ask for a joint and several order against all the Respondents.

[They cited *Stringer's Case* (1), *In re London and Provincial*

(1) Law Rep. 4 Ch. 475.

Starch Company, before Vice-Chancellor *James*, April 22, 1869, and *Ex parte Johnson* (1), to shew that the Court had power to make the order on a summary application under the 165th section.]

Mr. *Jessel*, Q.C., and Mr. *Lindley*, for the present directors of the *National Bank* :—

We do not deny that the sum of £5000 was paid to the bank for opening the account with the *Marseilles Land Company*, and we do not deny that this was a payment which could not be justified; but we say that as the present directors are an entirely different set of persons from those who received the money, and as the money was divided among the shareholders of that period, who may not now be shareholders, neither the directors nor the shareholders can be made responsible for what was done by their predecessors, and they cannot now be ordered to refund the money.

Then we say it cannot be shewn that the £5000 was paid by the *Land Company*. It is admitted that £360,000 was paid to the *Crédit Foncier*, but the sum paid to the bankers could not have been part of this amount, since the account of the *Crédit Foncier* was overdrawn at the time the cheque was given to the bank. It is proved, further, that the bank had advanced a sum of £30,000 to the *Crédit Foncier* at this very period, and the £5000 was in reality part of that sum so advanced by the bank. The payment, therefore, cannot in any way be traced to the *Land Company*. It is admitted that the payment of so large an amount for opening an account was an unusual transaction, and cannot be justified by mercantile usage; but in this particular case it was necessary to obtain the interest and the acknowledged reputation of a bank of this standing in order to attract shareholders, and £5000 was not an exorbitant sum to induce the *National Bank* to allow their name to be used for such an undertaking; therefore, without defending the transaction, we say that the money was paid for a valuable consideration. Under any circumstances the money was actually paid by the *Crédit Foncier*, and no order can be made in their absence, since they may be able to prove that they would be entitled to recover it. But if the money was paid out of the

(1) 1 Jur. (N.S.) 913.

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funds of the *Land Company*, the Court has no power to order its repayment, either under the 100th or the 165th section of the Act of 1862. The applicants have not made out their case that the £5000 was money in the hands of the bankers to which the company was *primâ facie* entitled under the words of the 100th section. Moreover, the money is not in their hands, for it has been paid away to the shareholders, and has not been retained by them. Under the 165th section the Court can make no order against the bankers, who are neither directors, managers, liquidators, nor officers of the company. It was held in *Feltom's Executors' Case* (1) that the 165th section must be construed strictly, that it did not apply to the executors of a deceased director, and that the Court had no right to stretch the powers intended to be conferred by the Legislature. The 165th section was clearly intended to apply only to persons in a fiduciary relation to the company, such as salaried officers, and certainly not to bankers. It was held in *Foley* v. *Hill* (2) that a banker did not stand in a fiduciary character to his customer. It was also held, in *Ex parte Hawkins* (3), that the Court could not extend the provisions of the 100th section beyond their strict meaning. Neither can it be said that the bankers are trustees of the company, for it is not enough that there should be a constructive trust—there must be a direct trust. This conclusion is to be drawn from *Ex parte Hawkins*, where it was held that a creditor who had enforced a garnishee order after a petition to wind up, was not a trustee within the meaning of the 100th section. We deny, therefore, that the Court has jurisdiction to make this order upon a summary application under the 100th or 165th sections of the Act.

Mr. *Cotton*, Q.C., and Mr. *B. B. Rogers*, for the directors, *Lewis* and *Henshaw*:—

In addition to the contentions already addressed to the Court, we also submit that there is no evidence to shew that the directors had anything to do with the payment of this sum to the bankers. They are not responsible individually for the acts of the company, and there is no proof that these gentlemen assented to the transac-

(1) Law Rep. 1 Eq. 219. (2) 2 H. L. C. 28.
(3) Law Rep. 3 Ch. 787.

tion, and it was held in *Madrid Bank* v. *Pelly* (1) that the directors could not be charged with the money paid to the promoters.

The VICE-CHANCELLOR said that he should only require Mr. *Glasse*, in reply, to address himself to the questions, whether the money was actually paid out of the moneys of the *Marseilles Company*, and whether the banker was an officer of the company.

Mr. *Glasse*, in reply:—

We contend that the £5000 was received by the bankers under circumstances which prove that they had no right to receive it. Three of the directors of the bank being directors of the *Marseilles Company*, they must have known why the money was paid. The project was introduced to the public under their auspices, and with the sanction of their names put forward on the prospectus. They are, therefore, persons standing in a fiduciary character to the company, and have brought themselves within the 165th section. But if the Court has any doubt about the jurisdiction, we ask for leave to file a bill, when evidence can be produced as to the facts.

SIR R. MALINS, V.C.:—

The facts brought before the Court on this motion represent the transactions of this company to have been of a most discreditable kind. It is proved by the affidavit of Mr. *Alexander Samuelson*, one of the three liquidators, that the company was formed for the purpose of purchasing land at *Marseilles;* and in the prospectus there appear the names of three gentlemen who were directors of the *Crédit Foncier and Mobilier*, two directors of the *Agra and Masterman's Bank*, and three directors of the *National Bank*. Before the formation of the company, a contract had been entered into to purchase the land at *Marseilles*, of one Mr. *Masterman*, for £1,807,633. It is proved that of this sum nearly £664,000 was added to the price of the land, to be retained by or distributed amongst the parties engaged in the promotion of the *Imperial Land Company*. Of that sum the *Crédit Foncier Company* got no less than £360,000, if not half-a-million of money. It appears

(1) Law Rep. 7 Eq. 442.

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that Mr. *Albert Grant* had got so into the habit of dealing with large sums of money, that while in *Paris* he distributed £10,000 here, £25,000 there, £15,000 in another place, and other large sums, with as much readiness as some people would have given halfcrowns. The question now before me relates to the insignificant sum of £5000, and arises in this way:—

The company was registered on the 19th of January, 1866, and the first board-meeting took place on the 24th of February, when the prospectus was approved of and issued. It appears that at this meeting Mr. *Harvey Lewis* and Mr. *Henshaw* were present. I assume that they believed the undertaking to be one which was likely to be profitable, and was likely to bring in shareholders. The bankers were to be the *Agra and Masterman's Bank*, the *National Bank*, and the *National Bank* of *Liverpool*, and, under the circumstances, it might well be considered that the account was one which the bankers ought not to have been rewarded for taking; for the natural expectation must have been that large balances would remain in their hands, and that they would, in fact, think themselves fortunate in being selected as the bankers to whom the funds of such a company as this would be entrusted.

I can excuse no man of business for not adopting that view, but we find Mr. *Harvey Lewis* making this extraordinary statement, by his affidavit, that he neither consented nor objected, as a director of this company, to the payment of £5000 to the *National Bank* for opening a banking account with them, and that he never had an opportunity of doing so. This gentleman, who was present at the meeting of the 24th of February, was a director of the *Land Company*, and a most active and prominent director of the *National Bank;* and two days afterwards, the letter of the 26th of February, 1866, was written, containing what I designate as one of the most extraordinary propositions ever made in the course of commercial affairs. The letter was read in the presence of Mr. *H. Lewis*.

How such a letter could have been read before a body of directors without their expressing their indignation at it, I cannot understand, for it is a departure from all mercantile usage, and a transaction which in my opinion pointed at fraud; and yet this gentleman, who presided on the occasion, says that he neither assented nor dissented to the proposition. The letter is signed by

Mr. *Lowe*, who acted in the double capacity of secretary to the *Crédit Foncier Company* and to the *Land Company*. I must assume, therefore, that it was written by the authority of Mr. *Harvey Lewis* and Mr. *Henshaw*, as directors of the *Land Company*.

Mr. *Parker*, the manager of the bank, has made an affidavit, and he admits that it is the only instance in which he ever heard of this bank or any other bank having done such a thing. He says it is sometimes usual for a bank to receive commission from its customers; and everyone is aware that if a customer has a troublesome account with a banker, and is unable to keep a balance to remunerate him for his trouble, it is not unusual for a banker to make a charge as commission for keeping the account. But Mr. *Parker* admits, on his cross-examination, that no other company ever made such an offer as this, and that it is a thing wholly without precedent. What excuse was there for this? Was it a troublesome account? I have had the passbooks handed up to me, and I find they began receiving money on the 24th of February, the day the account was opened. In the course of a month they had more than £50,000 in hand, and I have it in this affidavit that on the 25th of March following, it was reported that the company had then standing to its credit at the *National Bank* £65,709, and that the *Agra and Masterman's Bank*—who, I believe, also received a premium of £5000 for opening the account—had no less a sum than £332,000. I have traced it in the banking-books, and I find—taking it from the opening of this account in February down to the 29th of June, when the £5000 was paid—that the balance was never reduced so low as £8000. But £8000 is not ordinarily considered to be a very small balance, and I find between the 26th of February, when this letter was written, and the 29th of June, when the money was paid, the average balance of this company with the bank was certainly not below £30,000. Now, when I consider that this was paid as a premium to keep an account where the customer had a balance, averaging, down to the time of the payment being made, not less than £30,000, and frequently £70,000, and that this balance was in their hands in the spring of 1866—during a greater part of which time, as matter of history, it is well known that the minimum rate of discount at the *Bank of England* was 10 per cent., at which price it was fixed by

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the Government on the evening of the 11th of May, 1866—and that they had during all that time the use of this money, is it wonderful that Mr. *Jessel*, who appeared as leading counsel for this bank, should feel the force of the pressure put upon him, and that he should admit, as he did most fully, that this was a payment disgracefully made and disgracefully received, and that all he can say in defence of this bank now, is this (not looking at it as a corporate company bound by royal charter, but as incorporated under 10 Geo. 4), that because there has been a change of directors, and to some extent a change of shareholders, and because this £5000 received in 1866 was distributed among the shareholders of that day by the directors of that day, therefore being a different body of directors, and to some extent a different body of shareholders, the money ought not to be returned? I am very sorry to find that the directors of the *National Bank* should have so greatly failed in their duty as they have done, and I believe the respectable body of gentlemen who have succeeded to the previous directors, and whose names have been handed up to me, would be utterly incapable of entering into transactions like these. I am grieved to find that the directors of this bank have not thought it right to set themselves straight with the Court, and with the public, by insisting on the restoration of this money, which, upon every principle, I am of opinion they ought not to lose any time in restoring to the unfortunate body of shareholders from whom it has been most improperly taken.

But, however strong my opinion may be upon that subject, the question before me resolves itself into an objection of a technical nature. With regard to the directors who are before me, one of them, Sir *Joseph McKenna*, has not appeared; but the other two, Mr. *Harvey Lewis* and Mr. *Henshaw*, have appeared, and have taken objections of a technical nature. I must say these objections do them very little credit. But the question is this: It has been, among other things, contended that this money is not the money of the *Imperial Land Company*, because it was paid by the *Crédit Foncier*. It has not been denied, in the course of the argument, that the *Crédit Foncier* had, at the very least, £360,000 promotion money, and it is said that this £5000 now in question was paid out of the £360,000. I find everybody—Mr.

Harvey Lewis and Mr. *Henshaw* included—saying, that if they had known of the transaction they would not have been concerned in it. How is it they did not know it? I can only say they ought to have known it. I find Mr. *Henshaw* says it would have so shocked him that he would have had nothing to do with the company. So that two gentlemen of mature experience come forward, and say that what it was their duty to know they did not know, and took no pains to know. However, the argument is that it was paid out of this £360,000. Why, if the company paid £360,000 in order that this *Crédit Foncier Company* might pay over to the bank £5000, everyone can see they must have paid £5000 too much promotion money; and without paying this £5000, £355,000 would have been enough. But that the money was directly or indirectly paid by this *Land Company*, and by these unfortunate shareholders, who have been victims, no rational man, in my opinion, can entertain a shadow of doubt. It was either paid directly, or indirectly. It does not appear to have been paid directly, I am bound to say, but it was paid indirectly—in consequence either of funds being handed over by this *Land Company* to the *Crédit Foncier*, or in consequence of the *Land Company* having paid too large a sum for promotion-money to the *Credit Foncier*. I have no doubt, therefore, it was paid, indirectly, out of the funds of the *Land Company*.

Then comes the question—Can I, on this particular form of application, order it to be restored? On the part of the *National Bank* a technical objection has been taken. It is said that, although this money was disgracefully received and disgracefully paid, there is no obligation to pay it back—first, because it was money paid by the *Crédit Foncier Company;* secondly, that it was paid for services; and, thirdly, that the Court has no jurisdiction under the Act.

It is said, on the part of the liquidators, that if the money *primâ facie* belonged to the company, then I am authorized to make the order under the 100th section, which is in these terms: "The Court may, at any time after making an order for winding up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company, to pay, deliver, convey, surrender, or transfer forthwith,

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or within such time as the Court directs, to or into the hands of the official liquidator, any sum or balance, books, papers, estate, or effects which happen to be in his hands for the time being, and to which the company is *primâ facie* entitled." Now, if the evidence had shewn this was paid by the *Land Company*—if, instead of being paid by the cheque of the *Crédit Foncier Company*, it had been paid by the cheque of the directors of the *Land Company*—I should have considered the payment so improper, so clearly a misapplication of the funds of this company, that I should have had no hesitation in saying that this money was the property of the company, and being in the hands of the bankers, that I should have been authorized under this section to make an order for them to repay it. But it was not paid by the *Land Company;* and I am afraid that, under the 100th section, it is impossible for me, under the circumstances, to make the order.

Then, am I authorized to make it under the 165th section? Now, however clearly I may be of opinion that this was virtually and actually the money of the company, yet I must be satisfied of two things—first, that it was paid by the *Land Company;* and, secondly, that the body against whom the application is made under the 165th section is a body falling within the description of that section. The words of the section are these: "Where, in the course of the winding up of any company under this Act, it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands . . . any moneys of the company," &c. Now, the bankers are not directors, they are not managers, and they are not liquidators. Then the only question is, are they officers of the company? I am sorry to be obliged to come to the conclusion that I cannot regard the banker of the company as an officer of the company, and that the bankers being named in the 100th section for another and different purpose, not as persons falling within this, it rather goes to shew that it was not conceived that they were included under the 165th section. Therefore, upon the whole, I come to the conclusion that I cannot treat a banker of the company, within the meaning of this section, as an officer of the company; and not being so, it is very much like the case in which Sir *Richard Kindersley* decided that the executor of a director

is not within the words of this Act, and consequently I have no power, under the summary jurisdiction, to make the order against the bank.

The main stress of the case was that the Court has no jurisdiction, and upon the technical objection of want of parties, or upon those two facts which are necessary to be proved—namely, first, that the money was actually paid out of the moneys of the *Land Company*; and, secondly, that the banker is not an officer of the company within the meaning of the 165th section—I am sorry to say that I cannot come to the conclusion that I have the power in this summary mode to make the order.

With regard to the directors, their case is free from the technical difficulty as to being within this section, because directors are specially named; and, therefore, if the case against them were in other respects clear, I should have no hesitation in making the order against them. It is not for the want of power or jurisdiction that I cannot make an order against them as directors, under the 165th section, but for want of proof, for the reasons I have stated, that this money was the money of the *Land Company*. If I were satisfied that the £5000 was paid out of the money of the company a more clear and gross misapplication (for that is the word used in this section) of the funds of this company never could have been brought before the Court. One of the two technical objections, not both, also applies to the directors, and therefore, on that ground, I am unable in this shape to make an order against them.

What, then, is the result? It was urged upon me that if I had any doubt it would be better in this stage not to make an order, but to give leave to file a bill; and as the conclusion I have arrived at is that the *National Bank* ought, upon every principle, to restore this money with interest, if they do not, I give the official liquidator, at the expense of the company, leave to file a bill against them, to compel them, and so I do against the directors, if he thinks fit.

With regard to the costs, certainly the last thing I should think of doing is to give the *National Bank*, or these three directors, any costs. I would, on the contrary, make them pay costs if I had the power; but I cannot make them pay costs, and therefore, upon the

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whole, I think the best course will be to give the liquidators leave to file a bill.

Solicitors for the Liquidators: Messrs. *G. S. & H. Brandon.*

Solicitors for the *National Bank:* Messrs. *Tathams, Curling, & Walls.*

Solicitors for the Directors, *Lewis* and *Henshaw:* Messrs. *W. Tatham & Son.*

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In re INTERNATIONAL LIFE ASSURANCE SOCIETY.

GIBBS AND WEST'S CASE.

Company—Directors—Power to Borrow—Power to charge Calls—Disposition of Property after Commencement of Winding-up—Unlimited Company—Insurance Company—Set-off of Debt against Calls—Companies Act, 1862, *ss.* 101, 153.

7 Ch 797
9 Ch 511
2 Ch D. 479
9 Ch D. 596
605
12 Ch D 709
713.
17 Ch D 717, 720
24 Ch D 617

The deed of settlement of an insurance company contained no express power of borrowing, but empowered the directors to do and execute all acts, deeds, and things necessary, or deemed by them proper or expedient, for carrying on the concerns and business of the company, and to do, enforce, perform, and execute all acts and things in relation to the company, and to bind the company, as if the same were done by the express assent of the whole body of members thereof:—

Held, that the directors acted within their powers in borrowing money from the bankers of the company to meet pressing demands upon the company, and charging the proceeds of a call already made, but not immediately payable, with the repayment of the loan; and that two of the directors who had become sureties for the company, and had repaid the loan, were entitled to the benefit of the charge on the call.

Between the presentation of a petition to wind up an insurance company and the winding-up order, the directors, being in negotiation for the transfer of the company's business and liabilities to another company, and being pressed by the company's bankers for payment of their overdrawn account, passed a resolution giving the bankers a charge on the proceeds of calls made before the presentation of the petition, and gave their own promissory note for the amount of the debt, as sureties for the company:—

Held, that the charge on the calls, having, under the circumstances, been given with the *bonâ fide* intention of preventing the ruin of the company, ought to be confirmed by the Court in the exercise of the discretion given to it by the *Companies Act*, 1862, s. 153; and that the directors, having paid the debt of the bankers, were entitled to a lien on the proceeds of the calls.

A shareholder in an unlimited company, which is being wound up by

the Court, may be allowed to set-off a debt due to him from the company on an independent contract, against calls made on his shares under the winding-up, and this rule applies to an insurance company whose deed of settlement provides that the policies shall restrict the liability of the shareholders to the amount of their shares of the subscribed capital of the company.

THE *International Life Assurance Society* was established (originally under the name of the *National Loan Fund Life Assurance Society*) in 1838, with a capital of £500,000, in 50,000 shares of £10 each, subsequently converted into 25,000 shares of £20 each.

The deed of settlement contained the following provisions:—

Clause 4. "The business and concerns of the society shall be carried on under the management of directors . . . which directors shall have the general management, superintendence, and control of the society and its business concerns, books, papers, investments, securities, stocks, funds, effects, property, affairs, and concerns whatsoever, and shall have full power to do and execute all acts, deeds, and things necessary, or deemed by them proper or expedient, for carrying on the concerns and business of the society, and to enforce, perform, and execute all acts and things in relation to the society, and to bind the society as if the same were done by the express assent of the whole body of members thereof."

Clause 46. "Provided always, that if at the annual meeting in 1841, or any subsequent annual meeting, the society shall appear, by the accounts so to be rendered as herein provided, to have sustained and incurred losses and expenses to the extent of one-fourth of the actually subscribed capital of the society, it shall be lawful for a special general meeting to be convened for the purpose of resolving the dissolution of the society. . . And it shall be lawful for such general meeting, by a majority of the votes of the voters and proxies present thereat, to resolve on the dissolution of the society, and to fix a day for the dissolution thereof."

Clause 56. "The directors shall enter into such contracts of assurance and other contracts, and in such form and upon such rates and terms as they shall think fit; . . . provided also, that in every policy, grant, and contract [to be entered into or issued by the society], there shall be contained express words for making all sums of money payable by virtue thereof payable out of the funds and effects of the society only, and, referring to the provisoes in

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these presents, restricting the liability of the directors parties thereto, and of all other the members of the society, to the amount of their respective shares of and in the subscribed capital of the society."

The deed contained no express powers to borrow money.

In July, 1868, the society, having lost more than one-fourth of its subscribed capital, agreed, in pursuance of a resolution passed at a special meeting, held in May, 1868, to transfer its business, assets, and liabilities to the *Hercules Insurance Company, Limited.*

On the 13th of August, 1868, the directors made a call of £2 per share, payable by two equal instalments on the 30th of September and the 30th of October.

On the 14th of August, 1868, the directors obtained for the society, from Messrs. *Glyn & Co.*, the bankers of the society, a loan of £5000, on the terms of its being secured by the joint and several promissory note of the directors, and by a charge on the call; and accordingly, on the same day, they passed a resolution that the £5000, with interest, should be a charge upon and payable out of the call made on the 13th. The directors at the same time gave Messrs. *Glyn & Co.* their promissory note for £5000, with interest at 5 per cent., payable on the 1st of November, 1868.

In November, 1868, a petition was presented for the winding-up of the society, which came on for hearing in December, but was ordered to stand over.

On the 14th of January, 1869, *Glyn & Co.* called upon the directors to give them a new promissory note for £3511 13*s.* 10*d.*, being the aggregate amount of £1434 10*s.*, which remained due to them in respect of the loan of £5000, and £2077 3*s.* 10*d.*, the amount to which the society's account with them was overdrawn, and to charge the amount on the proceeds of the call made on the 13th of August, 1868, and also on the proceeds of a call made in April, 1868.

Accordingly, the directors, on the 27th of January, passed a resolution charging the £3511 13*s.* 10*d.* on the two calls, and gave their promissory note for the amount.

On the 19th of February, 1869, an order was made on the Petition presented in the previous November for the compulsory winding-up of the society, and on the 23rd of February an order

was made for continuing under the supervision of the Court the voluntary winding-up of the *Hercules Company*, which had commenced by resolutions passed and confirmed on the 3rd and 12th of the same month.

In June, 1869, Messrs. *Gibbs* and *West*, two of the directors of the society, paid to *Glyn & Co.* £2680 10*s.*, the balance then due in respect of the sums secured by the promissory notes and the charges on the calls.

Before the winding-up *Gibbs* had advanced £1100, and *West* £300, to meet pressing liabilities of the society.

On the 22nd of January, 1870, an order was made, on the application of *Gibbs* and *West*, that they should be admitted as creditors of the society for the £1100 and £300 advanced by them respectively, and for the £2680 10*s.* paid by them to *Glyn & Co.*, in the proportions in which they had paid it; reserving the question whether they were entitled to a lien on the calls of April and August, 1868, and without prejudice to the question whether they were entitled to set-off their debts against a call of £5 per share made under the winding-up; and the official liquidator was ordered to retain, out of the moneys received by him in respect of the calls of April and August, 1868, a sufficient sum to meet the £2680 10*s.* and interest.

An application was now made by *Gibbs* and *West*, that the £2680 10*s.*, with interest at 5 per cent. from the time of their payment of it to *Glyn & Co.*, might be paid to them out of the moneys in the hands of the official liquidator representing the produce of the two calls, and that the £1100 and £300 might be set-off against any calls made or to be made upon the applicants respectively under the winding-up.

The two questions of lien and set-off were argued and decided separately.

As to the question of lien,

Mr. *Cotton*, Q.C., and Mr. *Chitty*, for the Applicants:—

Under the resolutions of the 14th of August, 1868, and the 27th of January, 1869, *Glyn & Co.* had valid charges on the calls, and the Applicants, who gave their promissory notes as sureties for the company for the sums advanced by *Glyn & Co.* and charged on

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the calls, are entitled to stand in the place of *Glyn & Co.*, and have the benefit of the charges for the £2680 10*s.*, which they have paid to *Glyn & Co.* The directors, under the general powers vested in them by the 4th clause of the deed of settlement, had power to borrow money for the general purposes of the society: *Australian Auxiliary Steam Clipper Company* v. *Mounsey* (1), and to charge the calls already made with its repayment: *In re Sankey Brook Coal Company* (2). In that case the mortgage was upheld, though the call had not actually been made at the date of the mortgage.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the official liquidator:—

Both of the resolutions of August, 1868, and January, 1869, were *ultrà vires*. In the deed of settlement there is no power, express or implied, for the directors to borrow money, and without such power they cannot bind the society: *In re Worcester Corn Exchange Company* (3); *In re General Provident Society* (4). In *Australian Auxiliary Steam Clipper Company* v. *Mounsey* the clause in the articles of association relating to the powers of directors was different from the 4th clause of this deed of settlement, and the nature of the business of the company required that the directors should have power to borrow. At the date of the first of these resolutions the directors were carrying on the business of the society in contravention of the 46th clause of the deed of settlement—more than a fourth of the subscribed capital having been lost, and under these circumstances the borrowing of money was a breach of duty on their part. Even if the directors had power to borrow money and pledge the credit of the society, they could not in the absence of a power in the deed of settlement pledge the property of the society, much less the calls on shares: *Bryon* v. *Metropolitan Saloon Omnibus Company* (5); *Ex parte Stanley* (6). In *In re Sankey Brook Coal Company* there was an express power to mortgage the property and effects of the company, which was an ordinary trading company. The assets and subscribed capital of this society being the only fund out of which the policies are payable, to make that fund a security to a

(1) 4 K. & J. 733. (4) 17 W. R. 514.
(2) Law Rep. 9 Eq. 721. (5) 3 De G. & J. 123.
(3) 3 D. M. & G. 180. (6) 33 L. J. (Ch.) 535.

general creditor would be in the nature of a fraud on the policy-holders, and if any policy-holder had known that such a transaction was intended, he could have obtained an injunction to prevent it: *Aldebert* v. *Leaf* (1).

The charge attempted to be created by the resolution of the 27th of January, 1869, was void under the 153rd section of the *Companies Act*, 1862, having been made between the commencement of the winding-up and the order for winding-up. The sanction of the Court to such transactions must be obtained at the time of the transaction, and cannot be given afterwards. The Court will exercise the power given to it by the 153rd section, of sustaining transactions affected by that section, only in the case of *bonâ fide* transactions in the ordinary course of the current trade of a company, as in *Ex parte Pearson* (2). This was not such a transaction, but a charge on the property of the society to secure an antecedent debt—in other words, a fraudulent preference of one creditor, which it was the very object of the 153rd section to prevent. The directors must have known that the *Hercules Company*, which was wound up a few days afterwards, was insolvent, and that the arrangement for the transferring to it of the business of the society could not be carried out, and that the winding up of the society was inevitable; and if *Glyn & Co.* had attempted to sue the society for their debt, an injunction to restrain them could have been obtained under the 85th section of the Act.

Assuming that *Glyn & Co.* had a valid charge under both or either of the resolutions, the directors, who committed a breach of duty in involving the society in further liabilities after it had become impossible for it to carry on its business, cannot be allowed to have the benefit of the charges thus improperly created: *Gaslight Improvement Company* v. *Terrell* (3); at all events, the Court will not for their benefit give validity to the charge of January, 1869, and only a very small part of the £2680 10s., which remained due to *Glyn & Co.* in June, 1869, and was paid by the Applicants, is attributable to the loan of August, 1868.

The VICE-CHANCELLOR called for a reply only as to the transaction of January, 1869.

(1) 1 H. & M. 681. (2) Law Rep. 3 Ch. 443.
(3) Law Rep. 10 Eq. 168.

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Mr. *Cotton* :—

The resolution of the 27th of January, 1869, was a *bonâ fide* transaction, entered into for the benefit of the shareholders and policy-holders, and with the object of saving the society from immediate destruction. The Petition for winding up, which was a shareholders' Petition, had been ordered to stand over, and the only hope of saving the society was to keep it going until a transfer of its business and liabilities to the *Hercules* or some other insurance company could be effected. *Glyn & Co.* were pressing for payment of or security for their debt, and if their demand had been refused they might have presented a Petition to wind up the company, upon which an order must have been made at once. The best evidence of the *bona fides* of the directors is the fact of their having made themselves personally liable for the £2077 3*s.* 10*d.*

SIR R. MALINS, V.C. :—

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This summons raises a question of very considerable importance, not only as regards the particular transaction in question, but as regards joint stock companies under the process of winding-up generally.

This company is an insurance company, which had been in existence for about thirty years at the time of these transactions taking place. In the month of August, 1868, when the first of the transactions in question took place, the company had got into a state of considerable difficulty, and there can be no doubt that the directors who had the management of its affairs had come to the conclusion that it would be impossible for them to continue to carry on their business with success. They had therefore, in the previous month of May, opened a negotiation with another insurance company, the *Hercules*, which was believed at that time to be a solvent and a sound company, for the transfer of their business; and if the state of things which the directors believed to exist had, in truth, existed—namely, that the *Hercules* was a solvent and a sound concern—the transfer of that business, under the circumstances, would have been a great advantage to all the policy-holders and other creditors of the *International Society*. They had debts, and were in difficulties. They had a banking account with *Glyn & Co.*, which does not appear to have

been overdrawn in August, 1868. Being in want of money, they adopted the legitimate mode of obtaining it, which was to make a call. By the resolution of the 13th of August, 1868, the directors made a call of 40*s.* per share, to be paid by two equal instalments on the 30th of September and the 30th of October, 1868. Consequently, so far as the call would be applicable to pay and meet the pressing engagements, they would have to wait more than six weeks for part of the money, and more than ten weeks for the rest. Under these circumstances, wanting the money, they took a course which I cannot deem imprudent or blameable in any way; they applied to their bankers to make an advance to them.

Now, it has been very strongly urged in this case that, the company having no power to borrow, the borrowing was *ultrà vires* and improper, and that, therefore, no debt was created. I should say—as, indeed, I have already said on many occasions—that in the ordinary course of transactions of a mercantile concern, whether it be an insurance office or anything else, where the possession of money is essential for the purpose of carrying on the business, if the company finds itself in temporary difficulties for want of money, I cannot consider it beyond the powers of the directors to obtain money from their bankers or others who will temporarily lend it to them, for the purpose of preventing that which would be disastrous to all—namely, the stoppage of the company; that is to say, I cannot consider it beyond their powers to prevent that disaster by means of loans to a moderate extent, such as would not be unreasonable, having regard to the nature and extent of the business in which the company is engaged, for the purpose of carrying on the business of the company.

In this state of things the directors, being obliged to wait for the calls, and having immediate demands for money, apply to their bankers, Messrs. *Glyn & Co.*, to advance them £5000, and, there having been the resolution for the call on the previous day, the money is lent upon the faith of this resolution of the 14th of August, 1868: "The chairman announced that after repeated interviews with Messrs. *Murray & Hutchins*, the solicitors of Messrs. *Glyn & Co.*, the latter had consented to advance the sum of £5000 on the terms stated in Messrs. *Murray & Hutchins*' letter on the 13th instant—namely, that the joint and several pro-

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missory note of all the directors is given for the amount, with interest at 5 per cent., payable on the 1st of November next; that Mr. *Gregory*" (that is, Mr. *Gregory* of the firm of Messrs. *Gregory, Rowcliffes, & Rawle,* the solicitors of the society) "undertakes to push forward the payment of the calls already made and hereafter to be made, as much as possible, and to hand over to them the moneys produced by the calls immediately as received. A resolution of the board must be passed, authorizing Mr. *Gregory*, and directing him to pay over the money, and that a charge be given on the next call." Then the resolution was: "That Messrs. *Gregory, Rowcliffes, & Rawle,* the solicitors of the society, be directed to use their best exertions in recovering the calls already made," and so on. There is then this final resolution: "That the sum of £5000 advanced by Messrs. *Glyn & Co.*, and interest, be a charge upon, and payable out of, the call of £2 per share on the shares in this society made the 13th day of August, 1868."

There is, therefore, the call made, the deferred payment necessary for the call, the resolution to obtain the money from the bankers, and a resolution giving the bankers a charge upon that call. The effect of that was, simply, that they got the £5000 immediately, while for the call they would have had to wait, as I have already said, six weeks for part of it, and ten weeks for the remainder. That, in my opinion, was not in the slightest degree beyond the powers of the directors. It was a reasonable exercise of that very large discretion which was reposed in them by the deed of settlement of the company, which provides that "they shall have full power to do and execute all acts, deeds, and things necessary for carrying on the concerns and business of the society, and to do, enforce, perform, and execute all acts and things in relation to the society, and to bind the society, as if the same were done by the express assent of the whole body of members thereof."

In my opinion, the resolution to which I have referred gave Messrs. *Glyn & Co.* a valid security upon the calls to be received under the resolution of the 13th of August; and Messrs. *Glyn & Co.* having exacted the promissory notes of the directors in addition—the directors of the company at that time being under no obligation to provide money to meet the engagements of the com-

pany, but incurring upon that occasion a personal responsibility—I am of opinion, in the first place, that Messrs. *Glyn & Co.* acquired a valid security upon the calls; and they having acquired a valid security upon the calls, together with the personal responsibility of the directors, it is consonant with every principle of justice as administered in this Court that the directors who have paid off that debt should stand in the shoes of Messrs. *Glyn & Co.*, and that they should have that security which Messrs. *Glyn & Co.* had, so far as it remains unsatisfied.

Now, to shew that I do not stand alone in this view, I may mention a very recent case before Vice-Chancellor *James*, namely, the case of *In re Sankey Brook Coal Company* (1). In that case no call had been made, but there had been, not a resolution as in the present case, but an understanding that a call should be made; and in that case, as in this, the directors, being pressed, and having to meet engagements, obtained from their bankers a sum of money, not by way of resolution, or upon the security of a call already made, but upon the understanding that a call should be made. Now, how does Vice-Chancellor *James* deal with that? [His Honour read the judgment, and continued:—] Therefore, as I have said, there is power in the directors to mortgage a call already made to enable them to obtain an advance of money for the purpose of meeting engagements which the calls will not come in in time to enable them to meet. Now, it has been urged that that case depended upon the fact, that the directors had the power of borrowing £20,000. It is very true that that point was urged in aid of the case, but I do not find that the Vice-Chancellor decided upon that ground, and I am quite satisfied that he would have come to the same conclusion, if there had been no express power of borrowing.

In the deed of settlement of this society there is no express power of borrowing, but I am unable to come to any other conclusion than that the extensive provisions of the 4th clause of the deed of settlement do contain a power of borrowing, which power is to be reasonably exercised. Therefore, if it were necessary, I should come to the conclusion in this case that there is a power of borrowing. It is to be limited, the extent of it is not defined, but it

(1) Law Rep. 9 Eq. 721.

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must, like all other powers, be exercised in a reasonable manner. Then, has it been exercised in a reasonable manner? Certainly I can find nothing unreasonable in the manner in which the powers of borrowing were exercised in the case before me.

Upon these grounds, therefore, I come to the conclusion that Messrs. *Glyn & Co.* had a valid security under the transaction of August, 1868; and so far as their security remains unsatisfied—that is to say, to the extent of so much of the £5000 then advanced as remains unpaid—the directors having paid them will stand in their shoes.

But now comes the transaction of the 27th of January, 1869, to which, certainly, different considerations are applicable, and with regard to which the case is by no means so clear as it is with regard to the transaction of August, 1868. The difference is, that after August, 1868—namely, in the month of November, 1868—a petition was presented to wind up this company, upon which the order to wind up was not made until the 19th of February, 1869. There was, therefore, on the 27th of January, 1869, a pending petition to wind up; and this transaction, having taken place between the commencement of the winding-up and the order for winding-up, would, under the 153rd section of the *Companies Act*, 1862, unless the Court otherwise orders, have become void, and neither Messrs. *Glyn & Co.* could have acquired any security under it, nor could the directors, as standing in their place, have any charge upon the calls. The transaction of the 27th of January I may describe as being, in effect, a repetition of that of August, 1868, except that there remained due to Messrs. *Glyn & Co.*, in respect of the £5000 advanced in August, £1434; and there was then a balance on the general drawing account of £2077 3*s.* 10*d.*, and Messrs. *Glyn & Co.* were pressing for this balance.

Now we must see what was the position of affairs at this time. There was a pending Petition; the directors might well have said to *Glyn & Co.*, "You are creditors of the company, you must be paid out of the assets of the company. There is a winding-up Petition; we can make no payment, and if you sue us, we shall have power, under the 85th section of the Act, to stop your action." On the other hand, Messrs. *Glyn & Co.* were very urgent to be paid, and were in a position to embarrass the company. Now I must con-

sider whether this was a *bonâ fide* transaction. The directors gave their own promissory note for the balance remaining due of the loan of August, and the £2077 which remained due on the drawing account; that is to say, they rendered themselves personally liable to pay £2077, with regard to which sum they were under no personal liability up to that time. Now this certainly could not have been from any improper motive. No body of men would have rendered themselves liable to pay that considerable sum of money, unless they thought that there was some advantage to be gained. To themselves, it appears to me, there was no advantage to be gained, because Messrs. *Glyn & Co.* would have been entitled to go against the society, and the society would have been entitled to stop them on account of the pendency of the petition. I can, therefore, only come to one conclusion, namely, that the negotiation with the *Hercules* not having come to a final end, these directors—for the present purpose I must assume, actuated by a desire to do their best for all concerned—thought that if they allowed *Glyn & Co.* to stop the society, it would be disastrous to all; but if they satisfied *Glyn & Co.* by giving them a security, and themselves becoming liable, they might be able to carry out the arrangement with the *Hercules*, and avoid that state of things which would be most detrimental to all concerned. I must, therefore, come to the conclusion that the transaction was *bonâ fide* entered into, and that being so, it does not follow that because it was entered into pending the petition to wind up, it is necessarily void. It is true that this is different from the question which came before the Court of Appeal in the case of the *Wiltshire Iron Company* (1). That was a case in which a customer had had certain goods delivered to him—that is to say, they were put into the waggons for delivery, and, he being the consignee, it might be considered that the property was vested in him: there being a petition for winding-up pending, the question was whether he, having paid for the goods, was to stand as a creditor of the company, or to have the goods. The Vice-Chancellor held that he was entitled to have the goods, and there was an appeal from that decision. Lord *Cairns*, in his judgment, says (2): "The 153rd section no doubt provides that all dispositions of the property and

(1) Law Rep. 3 Ch. 443. (2) Law Rep. 3 Ch. 446.

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effects of the company made between the commencement of the winding-up (that is, the presentation of the Petition) and the order for winding up shall, unless the Court otherwise orders, be void. This is a wholesome and necessary provision, to prevent, during the period which must elapse before a Petition can be heard, the improper alienation and dissipation of the property of a company *in extremis*. But where a company actually trading, which it is the interest of every one to preserve"—(that observation is applicable to the present case, because it was to the interest of everybody concerned to preserve this company in order to enable it to carry out the arrangement with the *Hercules*, which was believed to be a solvent concern)—"and ultimately to sell as a going concern, is made the object of a winding-up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, *bonâ fide* entered into and completed, would be avoided, and would not in the discretion given to the Court be maintained, the result would be that the presentation of a petition, groundless or well-founded, would *ipso facto* paralyse the trade of the company, and great injury without any counterbalance of advantage would be done to those interested in the assets of the company." Every one of those observations, in my opinion, is applicable to this case. It was, in my opinion, a *bonâ fide* transaction, and done with the view of preventing a state of things most disastrous to all parties concerned.

I am therefore of opinion that, although the circumstances require very careful consideration, it is a case for the exercise of the power vested in the Court by the 153rd section of the Act, of holding that this transaction should not be void. I cannot acquiesce in the argument of Mr. *Glasse* as to obtaining the direction of the Court, for it would be almost impossible that directions could from time to time be obtained; but when the matter is brought before the Court, it must have regard to all the surrounding circumstances, and if from all the surrounding circumstances it comes to the conclusion that the transaction should not be void, it is within the power of the Court, under the 153rd section, to say that the transaction is not void. I am therefore of opinion, that the directors having paid Messrs. *Glyn & Co.*, they must stand in their place for so much of the two debts as is not satisfied.

As to the question of set-off,

Mr. *Cotton*, Q.C., and Mr. *Chitty*, for the Applicants:—

In the case of the winding up of an unlimited company, a creditor who is also a contributory is entitled to set off a debt due to him from the company against calls made on him in the winding-up. There is nothing in the *Companies Act*, 1862, to deprive him of his right; on the contrary, the 101st section recognises it. In *Grissell's Case* (1), where it was decided that in the case of a limited company the contributory-creditor has not the right of set-off, Lord *Chelmsford* said (2) that, by the 101st section, "a set-off upon an independent contract is allowed to the member of an unlimited company against a call, although the creditors have not been paid—evidently because he is liable to contribute to any amount until all the liabilities of the company are satisfied, and therefore it signifies nothing to the creditors whether a set-off is allowed or not." It is immaterial to the creditors, and as between himself and the other contributories, the creditor-contributory is entitled, according to the ordinary principles of taking partnership accounts, to be credited with the amount of his debt as a payment of calls by anticipation. In *Brighton Arcade Company* v. *Dowling* (3) it was held that, inasmuch as the 101st section does not apply to a voluntary winding up, a shareholder even in a limited company being wound up voluntarily was entitled to set off his debt against a call, on the ground that there was no statutory provision depriving him of his right under the old Statutes of Set-off. This is a company with unlimited liability as regards all creditors except policy-holders; and the fact that the policy-holders have entered into a special contract limiting the personal liability of the shareholders to them, does not make it a limited company within the meaning of the 101st section of the Act.

[They also referred to *In re Professional Life Assurance Company* (4).]

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the official liquidator:—

Even if this is to be treated as an unlimited company, the 101st section of the Act precludes the applicants from setting off

(1) Law Rep. 1 Ch. 528. (3) Law Rep. 3 C. P. 175.
(2) Ibid. 536. (4) Ibid. 3 Ch. 167.

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their debts against calls. The first part of the section gives the Court the summary power of compelling contributories to pay their debts to the company exclusive of calls made in the winding-up, and empowers the Court in making such order, when such company is not limited, to allow, by way of set-off, debts due to the contributory from the company; but by thus expressly allowing the set-off to be made against debts due from the contributory other than calls, it implicitly prohibits the set-off against calls; and the proviso which allows the set-off of debts against calls, after all the creditors have been paid in full, implies that there can be no such set-off until the creditors have been paid. Lord *Chelmsford's dictum*, in *Grissell's Case* (1), seems to have been made under the erroneous supposition that the first part of the 101st section applied to calls made under the winding-up, which it expressly excludes. The reason which he there gives for allowing the set-off in the case of an unlimited company has no application to this company, the great majority of whose creditors are policy-holders, who, by the 56th clause of the deed of settlement, to which all persons dealing with the company are bound to look (*Ernest* v. *Nicholls* (2)), are precluded from calling upon the shareholders to pay more than the amount of the subscribed capital. It is obvious that to allow the set-off in this case will injure the policy-holders by diminishing the only fund to which they can resort; and even if the 101st section applied to this case, and the Court had the power to allow a set-off, it would not, under these circumstances, exercise that power. *Brighton Arcade Company* v. *Dowling* (3) was the case of a voluntary winding-up; there is no injustice in allowing the right of set-off in the case of a voluntary winding-up, because the creditors can at any time apply to the Court to have a compulsory winding-up, or a winding-up under supervision.

[They also referred to *Calisher's Case* (4).]

Mr. *Cotton*, in reply:—

The 101st section assumes that the same rule will apply to calls as to other debts due by a shareholder to the company. There can be no reason for allowing a set-off against calls made before, and not against calls made after, the winding-up.

(1) Law Rep. 1 Ch. 536. (3) Law Rep. 3 C. P. 175.
(2) 6 H. L. C. 401. (4) Ibid. 5 Eq. 214.

SIR R. MALINS, V.C.:—

The question as to Messrs. *West* and *Gibbs*, the claimants before me, being general creditors of the company, was finally settled by the order of the 22nd of January last, which order remains in force. That order makes Mr. *West* a general creditor unsecured in respect of £300 advanced by him for the purpose of paying the rent of the company; and it makes Mr. *Gibbs* a general creditor unsecured for £1100, which sum, it appears, was advanced for the general purposes of the company in the month of April, 1868.

The question, and the only question, which I have now to decide, is whether in the event of a call having been made in the winding-up, or being hereafter made, these two gentlemen would be entitled to set off the debts so due to them against the amount of calls made or to be made.

Now, if this is a limited company within the meaning of the *Companies Act*, 1862, there is nothing to discuss, because *Grissell's Case* (1), which was a decision of the full Court of Appeal, decided that in the case of a limited company—namely, *Overend, Gurney, & Co., Limited*—Mr. *Grissell* being a shareholder, and also a creditor of the company to an amount much larger than any call then made or likely to be made upon him, was not entitled to set off his debt as against a call made: in other words, that in a limited company there is no right to set-off, but that the person must pay his call in full, and then come in as a creditor for any debt which may be due to him in common with the other creditors. In that there seems to be considerable reason, not only because there is the positive enactment of the statute, but also because, if there is limited liability, and a contributory who is a creditor is entitled to set off a debt due to him against calls, the effect of that would be that he would get paid in full, while the other creditors would not get so paid. But in the case of an unlimited company that reason does not apply. In the case of an individual partnership or an unlimited company, it must be presumed that they are able to pay their debts in full until the contrary is shewn. The contrary has never been shewn in the present case, and therefore I can come to no other conclusion than that the company will be able to pay the full amount of what they owe.

(1) Law Rep. 1 Ch. 528.

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Now the decision in *Grissell's Case* (1) proceeded wholly upon the ground of its being a limited company. All the reasons given by Lord *Chelmsford* proceed upon the ground of its being a limited company, and there are no other reasons put forward. The passage in Lord *Chelmsford's* judgment (2), which Mr. *Higgins* said was erroneous (though I confess I was unable to follow him when he said so), is in these terms: "The case of a member of a limited company is different from that of a member of a company of unlimited liability as to set-off. This is exemplified in the 101st section, where a set-off upon an independent contract is allowed to the member of an unlimited company against a call, although the creditors have not been paid, evidently because he is liable to contribute to any amount until all the liabilities of the company are satisfied, and therefore it signifies nothing to the creditors whether a set-off is allowed or not. But with respect to a member of a company with limited liability, if a set-off were allowed against a call, it would have the effect of withdrawing altogether from the creditors part of the funds applicable to the payment of their debts."

The 101st section does appear to me to be perfectly distinct. [His Honour read the section except the proviso at the end, and continued:—] There being, therefore, in the case of an unlimited company a clear right of set-off, unless the Court should direct the contrary, the next question is, supposing this to be an unlimited company, is this a case in which the Court ought to allow the set-off? Upon that subject I entertain no doubt whatever. These were moneys *bonâ fide* advanced by these directors for the purpose of supporting the company for the common benefit of all concerned, and for the purpose of preventing disastrous results to the shareholders at large; and I think that upon every principle of justice they ought to be allowed the right of set-off, if set-off is to be allowed in any case.

Then, it being clear, in my opinion, that the right to set-off is one which the Court is at liberty to allow in the case of an unlimited company, and it being equally clear, in my opinion, that the circumstances of this case are such as to call upon the Court to allow that set-off, the only question that remains is, is it a

(1) Law Rep. 1 Ch. 528. (2) Law Rep. 1 Ch. 536.

limited or an unlimited company? Now, that it is not a limited company under this Act is beyond all question. It was contended and much urged by Mr. *Glasse*, that all persons dealing with this company were bound to know the provisions of the deed of settlement of this company, and he particularly referred to the 56th clause, by which it is provided that they shall only be at liberty to issue policies charging them upon the funds of the company. We all know the provisions which the Legislature has inserted, providing that a limited company must use the word "limited" in all its papers and documents, and in all transactions; that it must also have the name over the door and on the window, and that in every place where the name of the company is used, it must be used with the addition of the word "limited," for the purpose of giving the public notice that they have not the general liability of the shareholders, but only such an extent of liability as they have contracted to be liable for by the constitution of the company. But in this case, how was anybody to know that this was a limited company? There is no notice, and there is no limited liability. No doubt as to a particular class of creditors, the policy-holders, the company have contracted a limited liability; that is to say, they have entered into a contract with the policy-holders, which says, upon the face of the contract itself, that the policy-holders are to look only to the assets of the company. But with the creditors in general there is no such contract. If the company orders furniture, or enters into any such contract, it is a contract of a general nature, and there is no limit of liability introduced. It does appear to me upon the soundest and broadest principles, that if a company contracts any debts as to which there is unlimited liability, although it may contract other debts with regard to which the liability is limited, the mere fact that it contracts some debts as to which the liability is unlimited, does make it an unlimited company, and brings it within this provision, which says that in the case of unlimited companies the right to set-off exists. If I were to make an order now, that these gentlemen are not to set off these sums, the consequence would be that they would be obliged to pay the calls, and stand as general creditors for the money which the company owes them. I do not know what the circumstances of these gentlemen are—it is not right that I should; but it might

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ruin them, because they would have to pay these calls, when they stand as creditors for a much larger sum. I conceive there is nothing here to prevent the right of set-off, but every principle of justice requires me to adopt it. It is an unlimited company, and the Act of Parliament says that it may be done in the case of an unlimited company, and there is also a decision of the Court expressly laying down that it may be done in the case of an unlimited company; in fact, there is almost an obligation to do it. I have been referred to the case of the *Brighton Arcade Company* v. *Dowling* (1), with regard to which I confess, after all that has been said upon it, and after all that learned Judges have said, I am unable to see that it is not in conflict with *Grissell's Case* (2), which has settled that, where the liability is limited, the right to set-off cannot exist. In the case of the *Brighton Arcade Company* there was an action for calls under a voluntary winding-up. Whether the winding-up is voluntary or compulsory, it is under the same Act of Parliament; but as it was a voluntary winding-up, and there was no power of compelling the payment of calls, the liquidator brought an action, and the Court of Common Pleas decided that the right to set-off did exist, and that *Grissell's Case* did not apply; but I am perfectly unable to see that the two cases can stand together.

However that may be, *Grissell's Case* and *Calisher's Case* (3), which are the only two cases that were referred to as laying down the rule that the right to set-off does not exist, are cases of limited companies. This is the case of an unlimited company, therefore the right to set-off does exist, and consequently Messrs. *West* and *Gibbs* must be allowed to set off the amount due to them from the company against any call already made, or hereafter to be made.

Solicitor for the Applicants: Mr. *P. Roberts.*
Solicitor for the Official Liquidator: Mr. *J. Tucker.*

(1) Law Rep. 3 C. P. 175. (2) Law Rep. 1 Ch. 528.
(3) Law Rep. 5 Eq. 214.

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1870
March 19, 21.

Company—Winding-up—Jurisdiction—Companies Act, 1862, *s.* 199—*Canal Company incorporated by Act of Parliament.*

17 Eq. 183.

The Court has jurisdiction under the *Companies Act*, 1862, s. 199, to wind up a canal company incorporated by Act of Parliament, and will make a winding-up order in such a case, although it may be necessary to apply for an Act of Parliament to enable the property of the company to be sold.

A canal company, whose canal had been disused for three years, in consequence of an injunction of the Court of Chancery restraining the company from supplying the canal with water from a stream which had become polluted, and of the impossibility of obtaining a supply of water from any other source without incurring very great expense, was ordered to be wound up on its own Petition.

THIS was a Petition for the winding-up of the *Company of Proprietors of the Bradford Navigation.*

The company was incorporated by Act of Parliament in 1771, for the purpose of making a canal from a bridge in *Bradford*, called *Hoppy Bridge*, to join the *Leeds and Liverpool Canal.* They were empowered by the Act to supply the canal with water from such springs, soughs, brooks, drains, and watercourses running into a brook called *Bowling Mill Beck* as should be found within 2000 yards of *Hoppy Bridge*, and to purchase the lands through which the canal should be made; and the Act provided that upon payment of the purchase-money the fee simple of such lands should be vested in and become the sole property of the company "for the use of the said navigation, but for no other use or purpose whatsoever." The Act provided that all persons whatsoever should have liberty to use the canal, and the wharves, quays, and towing-paths, upon payment of such rates and duties as should be demanded by the company, not exceeding the rates therein specified. The Act contained no provision for the dissolution of the company.

The canal was opened in 1774, and from that time until 1867 was supplied with water from a stream called *Bradford Beck*, into which *Bowling Mill Beck* empties itself at a point about 356 yards distant from *Hoppy Bridge.* In consequence of the great increase

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of the town of *Bradford*, and of the manufactories, mills, and dye-works on the banks of *Bradford Beck*, the water derived from *Bradford Beck* became impure, and consequently the canal became a nuisance. In 1864 the company and their lessees were indicted for a nuisance, and judgment was obtained for the Crown against the lessees, after a decision of the Court of Queen's Bench, on a special case (1).

In 1865 an information was filed against the company and their lessees for an injunction to restrain them from diverting into their canal, or allowing to pass into the same, or collecting, or keeping, or continuing therein any filth, sewage, or polluted matter or water, so as to be a public nuisance; and in March, 1866, a perpetual injunction in those terms was granted by Vice-Chancellor *Wood* (2), which was ordered to take effect on the 8th of November, 1866, but was afterwards suspended until the 1st of May, 1867. The company on that day ceased to take water from the *Bradford Beck*, and the canal had ever since been virtually empty and closed for navigation.

In 1867 the company introduced a bill into Parliament to empower them to close the canal and sell the site, and in the same year the *Leeds and Liverpool Canal Company* introduced a bill to vest the canal in them by way of lease in perpetuity, but both bills were thrown out. The *Leeds and Liverpool Company* had proposed to take a lease of the canal at a rent of £1200 a year, and to supply it with water from their own canal by means of pumping engines, the estimated cost of which was about £12,000, on condition that if the lease were not made perpetual the *Bradford Company* should, at the termination of the lease, purchase the engines and machinery at a valuation.

The property of the company consisted of the canal, part of which, being situated in the centre of the town of *Bradford*, was said to be saleable at a very high price; other land and houses and shops, let for £380 a year, and £5109, the proceeds of the sale of surplus lands.

Some of the shares were held by married women and infants, and trustees for persons under disability.

In November, 1869, this Petition was presented by the company,

(1) 6 B. & S. 631. 10 Jur. N. S. 766. (2) Law Rep. 2 Eq. 71.

pursuant to a resolution passed at a general meeting. On the 20th of December it came on for hearing, and was ordered to stand over, with a view to an arrangement between the Petitioners and the Corporation of *Bradford* and the *Aire and Calder Canal Company*, who appeared to oppose it, a preliminary objection on behalf of the Petitioners to the right of the Respondents to be heard having been overruled (1). The parties being unable to come to any terms, the Petition now came on to be heard.

In addition to the former Respondents, certain owners of quarries adjacent to the canal, and of wharves on the canal, appeared to oppose the Petition.

The Corporation of *Bradford* had, since the former hearing, offered to concur with the Petitioners in obtaining an Act of Parliament to enable them to sell the canal to the corporation for £27,000, for the purpose of converting it into a road, but the offer was declined.

Evidence was adduced on behalf of the other Respondents to the effect that the closing of the canal was injurious to the town and neighbourhood of *Bradford*, by giving a monopoly of goods and mineral traffic to the railway companies, who had consequently raised their fares, and was especially injurious to the *Aire and Calder Company*, whose canal was connected with the *Bradford Canal* by the *Leeds and Liverpool Canal*, and to the wharf owners; it was also proved that a supply of water for the canal might be obtained from other sources than the *Bradford Beck*, at an expense estimated by different engineers at sums varying from £11,000 to £19,000.

Mr. *Pearson*, Q.C., and Mr. *Hastings*, for the Petitioners:—

The Court has jurisdiction to wind up the company: *In re Basingstoke Canal Company* (2); *In re Wey and Arun Canal Company* (3). It may be that it will be necessary to obtain an Act of Parliament for the purpose of selling the site of the canal, as was done in the *Wey and Arun* case; but without the sanction of the Court the company have no power to apply their funds in applying for an Act, and any dissentient shareholder might restrain them

(1) Law Rep. 9 Eq. 80. (2) 14 W. R. 956.
(3) Law Rep. 4 Eq. 197.

(W Rep by L J James 5 Ch. 600

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from so doing. Several of the shareholders are under disability, and cannot consent to an unauthorized use of the funds of the company. The case is clearly within the 199th section of the *Companies Act*, 1862, the company having ceased to carry on business for nearly three years. The company have been prevented by the injunction of this Court from obtaining water from the source from which they were by their Act empowered to take it, and they cannot obtain a supply from any other source, except at a ruinous expense. The result is that the canal is necessarily closed, and is not only unprofitable to the company, but is a nuisance to the inhabitants of *Bradford*. It is certainly just and expedient to put an end to this state of things, and this can only be done by means of a winding-up order. Even if the company could apply for an Act of Parliament, they would meet with so much opposition from the present Respondents and others, that they would incur great expense and probably be defeated, as they were in 1867; whereas if a scheme for the disposition of the canal is sanctioned by the Court, an Act to give effect to it would probably be obtained without difficulty. If the Corporation of *Bradford* are willing to purchase the canal, the terms of such a purchase may be settled with the sanction of the Court in the winding-up. As to the other Respondents, no doubt the stoppage of the canal may be injurious to them, but the Petitioners cannot be compelled to keep the canal in a navigable state, the change of circumstances having prevented them from doing this without creating a nuisance: *Reg.* v. *Bradford Canal* (1). Although the canal has been empty for three years no one has attempted to take steps to compel the company to fill it. Those who are interested in maintaining the canal may propose some scheme in Chambers for that purpose. The *Leeds and Liverpool Canal Company*, whose canal is connected with the *Bradford Canal*, and is, in fact, the only source from which it could be supplied with water, and who in 1867 proposed to take a lease of it on terms which were not approved of by Parliament, have made no further offer, and are not now before the Court. The Petitioners have waited for two years to give all parties the opportunity of making some reasonable proposal, but none has been made.

(1) 6 B. & S. 631.

Mr. *Cole*, Q.C., and Mr. *Freeling*, for the Corporation of *Bradford*:—

The winding-up jurisdiction under the *Companies Act*, 1862, was not intended to apply to such a company as this, although the language of the 199th section may be wide enough to include it. When a company is wound up under the Act, the official liquidator is empowered by the 95th section to sell its property, and the Court is required by the 111th section to make an order dissolving the company. But how can the Court sell land which has been dedicated by Act of Parliament to the purpose of a public canal, or dissolve a company which has been incorporated and made perpetual by Act of Parliament? It is true that winding-up orders were made in the cases of the *Basingstoke Canal Company* (1) and the *Wey and Arun Junction Canal Company* (2); but in the former case the order was made without argument on an unopposed Petition, and it was found impracticable to carry on the winding-up, and the order was not acted upon; in the latter case it was found necessary to obtain an Act of Parliament to enable the official liquidator to close and sell the canal (3).

Assuming that the Court has jurisdiction to wind up the company, it is not bound to do so, and will in the exercise of its discretion refuse to make an order under which nothing can be done without the assistance of Parliament. The sole object of this Petition is to enable the Petitioners to put money into their pockets

(1) 14 W. R. 956.

(2) Law Rep. 4 Eq. 197.

(3) The *Wey and Arun Junction Canal (Abandonment) Act*, 1868 (31 & 32 Vict. c. clxxiii).

The preamble of the Act recites that "doubts having arisen whether the powers conferred by the *Companies Act*, 1862, were sufficient to authorize the abandonment of the company's undertaking, and the sale of their property therein or connected therewith, the Vice-Chancellor had made an order 'that the official liquidator should be at liberty to apply for and do all things necessary for the obtaining an Act of Parliament authorizing him to close, and when closed, to sell and dispose of, the said canal, and all other the property of the company . . . free from all rights of way and any other rights or covenants now enjoyed by the public or any other persons whomsoever, on and upon such canal and its banks or any other property belonging to the company, and all other rights mentioned in the recited Act, and any other rights that may have been acquired by the public in or over the said canal,' and that it was expedient that the powers above referred to should be conferred . . . but the same cannot be done without the authority of Parliament."

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by selling the land which was vested in them by statute for a special purpose, and it would be an abuse of the winding-up jurisdiction to apply it for such an object. If they have a good case, they may apply to Parliament for an Act, and no shareholder would in that case succeed in obtaining an injunction to prevent them from using the funds of the company for that purpose. But there is no necessity for closing the canal; the injunction only prevents them from using polluted water, and it is proved that they may obtain a supply of pure water, and that it is only a question of expense.

Mr. *Glasse*, Q.C., and Mr. *Streeten*, for the *Aire and Calder Canal Company*:—

There can be no reason why canal companies should and railway companies should not be subject to be wound up under the *Companies Act*, 1862, and canal companies must have been omitted in the exception to the 199th section *per incuriam*. It could not have been intended that a canal company should be wound up so as to deprive the public of the rights to use the canal, and to injure other canal companies whose canals are connected with it, and who are, by the 8 & 9 Vict. c. 42, empowered to use it as carriers. In the *Wey and Arun* case (1) if the Court had known that the order in *In re Basingstoke Canal Company* (2) had been abortive, and that it would be necessary to apply for an Act of Parliament, the order would probably not have been made, and the Court will not now, after the experience of those cases, make an order which must be nugatory unless Parliament is willing to assist in giving effect to it. In both the former cases the companies were insolvent, and the canals were useless and out of repair; here the canal is of the greatest importance and use to the public, and the company is solvent, and by granting a lease of the canal to the *Leeds and Liverpool Company* they might have kept the canal open at a very reasonable profit. The Petitioners have a public duty imposed on them, and they cannot, by neglecting that duty and ceasing to carry on business, entitle themselves to get a winding-up order to assist them in diverting their property from the purposes for which they were permitted to acquire it. This is certainly not a case for

(1) Law Rep. 4 Eq. 197. (2) 14 W. R. 956.

this Court to exercise the discretionary power of making a winding-up order under the "just and equitable" clause of the 199th section: *In re Joint Stock Coal Company* (1).

Mr. *Ince*, and Mr. *Chitty*, for the owners of wharves and quarries.

[The VICE-CHANCELLOR:—Are you entitled to be heard?]

These Respondents will suffer a particular injury by the stoppage of the canal, and that gives them a *locus standi*: *Cook* v. *Mayor and Corporation of Bath* (2).

[The VICE-CHANCELLOR:—I do not think that you are strictly entitled to be heard, but I will hear you.]

The case of a canal company is very different from that of an ordinary joint stock trading company. The Acts under which canal companies are incorporated are to be regarded in the light of contracts made by the Legislature on behalf of every person interested in anything to be done under them: *Blakemore* v. *Glamorganshire Canal Navigation* (3); they empower the companies to acquire land for a particular purpose, and the lands so acquired cannot be used for any other purpose: *Bostock* v. *North Staffordshire Railway Company* (4). It is clear, therefore, that the site of the canal cannot be sold without an Act of Parliament. The Petitioners ask for a winding-up order, on the ground that they have ceased to carry on business by employing the canal; but it was and is their duty to maintain the canal, and they might be compelled by *mandamus* to perform that duty: *Rex.* v. *Severn and Wye Railway Company* (5). They cannot take advantage of their own wrong.

[The VICE-CHANCELLOR:—If any of the Respondents will undertake to apply for a *mandamus*, I will order the Petition to stand over, to give you an opportunity of making the application.]

We ought not to be forced to take that course. It is for the Petitioners to shew that they are entitled to the winding-up order. Our evidence proves that there is no necessity for closing the

(1) Law Rep. 8 Eq. 146, 152.
(2) Ibid. 6 Eq. 177.
(3) 1 My. & K. 154, 162.
(4) 5 De G. & Sm. 584; 4 E. & B. 798; 3 Sm. & Giff. 283.
(5) 2 B. & A. 646.

(4) 5 De G. & Sm. 922. 4 B. 2 Jur. N.S. 248. 3 G

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canal; but the Petitioners, having for nearly a century carried on a profitable business, now that it has become necessary for them to expend money on the canal, and thereby reduce their profits, seek the assistance of the Court to enable them to deprive the public of the benefit of the canal and to make an enormous profit by selling the land, which they acquired for the sole purpose of the navigation. If the Petition is dismissed, they will find some means of maintaining the canal, but so long as they hope to sell the land they will do nothing.

SIR R. MALINS, V.C.:—

This is a Petition by the *Company of Proprietors of the Bradford Navigation*, and it seeks an order to wind up the company. The company was established by an Act of Parliament passed as long ago as 1771. The Act provided for the means of obtaining a supply of water for the purpose of the navigation, and it appears that for a century, or thereabouts, the company continued to draw its supply of water from a stream which is known by the name of the *Bradford Beck*, and from streams running into it, but mainly from that source. In consequence of the great increase of the population of *Bradford*, which is stated to have increased from 10,000 at the date of the Act to 130,000 now—and although the population has increased only thirteenfold, the manufacturing powers of *Bradford* have probably increased a hundredfold in that time—the water supplied to this canal from the sources provided by the Act had become so foul that certain persons, who afterwards filed a bill in this Court, in the year 1865 preferred an indictment against the company in the Court of Queen's Bench. The result of that indictment is reported (1), and it was entirely successful. But that was not sufficient to stop the matter going on, and therefore, to prevent the continuance of this nuisance, which was of a very serious character, an information was filed in this Court at the relation of the same parties who had succeeded upon the indictment. The case was heard before Vice-Chancellor *Wood* on the 14th and 15th of March, 1866 (2), and the result was, that the Vice-Chancellor granted an injunction, which remains in force, to prevent the company from taking their water from the *Bradford Beck*, because the

(1) 6 B. & S. 631. (2) Law Rep. 2 Eq. 71.

water so taken was so foul and so filthy that when it was poured into the canal it was a public nuisance; and they are, therefore, by the indictment at law, and finally by the injunction of this Court, prevented from any longer taking water from the *Bradford Beck*. The consequence is, as this Petition states, "that from the 1st of May, 1867, downwards, the canal has been and still is virtually empty and completely closed for navigation and traffic, inasmuch as the said company could and can obtain no adequate supply of water for their said canal, except from the *Bradford Beck*, or except from the *Leeds and Liverpool Canal* by the use of pumping machinery, which could only be erected at a very considerable cost, and which cost the said company has not sufficient means to provide for." Now, there is no dispute about this fact, that the canal is an empty, dry bed; I do not say absolutely dry, because the Petition states there is some water there—a fall of rain would give it some water—but for all practical purposes the canal is dried up, and a boat has not been floated upon it for now very nearly three years; and it is agreed, that without a very considerable expenditure (there is a difference of opinion, as might be expected, as to the extent of that expenditure,) it has become absolutely impossible to supply this canal with water. It is suggested that by additional sinking and boring and machinery the company may obtain a supply of water from lands which are shewn in a plan handed up to me by Mr. *Ince*, and which are said to contain 1200 acres. They may obtain a supply of pure water by that means, but the very gentleman, Mr. *Rook*, who gives the information, says that it can only be done, at the lowest estimate he makes, at a cost of £13,000, and an annual expenditure of £650. I think in another part of his affidavit he goes to the extent of saying that it may cost £19,000. Well, if an engineer before he begins his work tells you a work will cost £13,000, one may safely say that it may cost at least £20,000, and I have no doubt that that would be the expense of that process. Under these circumstances, as matters at present exist, this is a company which beyond all doubt has discontinued its business. The Respondents contend that it ought to resume its business, and is bound, in fact, to put itself in a situation of being able to resume its business.

The first question which I have to decide under these circum-

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stances is, this being an application under the *Companies Act*, 1862, whether it is a case in which I have power to wind up. That depends on the 199th section. I have had before me a somewhat similar case—of course differing in its circumstances—as to the general power of the Court under this Act to wind up a canal company—the case of the *Wey and Arun Canal* (1). In that case Mr. *Horton Smith*, who argued against the winding-up order, and I remember argued it very well, referred in his argument to very many of the topics which have been pressed before me to-day, and certainly there was present to my mind when I decided that case the extreme difficulty, the impossibility almost, of an order of this Court to wind up a canal company being made effective. I remember putting the question, "What is to be done with the bed of the canal? How is the water to be drawn off? and if drawn off, who is to deal with the bed of the canal? Is the bed of the canal to be sold to the owner of the adjoining land, or what is to be done with it?" All those difficulties I perfectly well remember pointing out. Nevertheless, I came to the conclusion that it was within the Act, and I thought I was therefore enabled to make the order, and I still believe the order I made to be a right order. Mr. *Glasse* is quite right in saying that this is a more important case; and in supposing that if I committed an error in making the order in 1867 to wind up the *Wey and Arun Company*, I should not be at all slow to alter my opinion, and come to a different conclusion in this case; but I confess, after hearing the arguments addressed to me, I am unable to see that a canal company, or any company established by Act of Parliament except a railway company, is not within the provisions of this Act. The words of the 199th section on which this question depends are these: "Subject as hereinafter mentioned any partnership, association, or company, except railway companies incorporated by Act of Parliament." Now therefore we know what this section is, and the section must be read with that single exception, "consisting of more than seven members, and not registered under this Act, and hereinafter included under the term 'unregistered company,' may be wound up under this Act, and all the provisions of this Act with respect to winding-up shall apply to such companies with the following

(1) Law Rep. 4 Eq. 197.

exceptions and additions." Then, very much in the same way as in the 79th section, it prescribes what are to be the events in which the winding-up order may be made—not "must" be made, but "may" be made. Division (*a*) is, "whenever the company is dissolved," it is not dissolved here, "or has ceased to carry on business," which this company undoubtedly has for a period of three years, "or is carrying on business only for the purpose of winding up its affairs." Then there is division (*c*): "Whenever the Court is of opinion that it is just and equitable that the company should be wound up." I quite agree that, in consequence of the judicial interpretation put upon the same language in the 79th section, it is very difficult to attach much importance to it; but still those words are not wholly to be disregarded. I have here the fact that the company has actually ceased to carry on business. Then the question is whether, under the circumstances, it is expedient to make the order to wind it up.

Mr. *Cole* pressed upon me that one of the inconveniences of making an order to wind up this company would be, that I could not dissolve the company, and he referred to the 111th section, which provides that, "when the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved accordingly." But if I am right in holding that a canal company incorporated by Act of Parliament may be wound up, I apprehend that the intention of the Legislature was, that all the incidents of winding-up should be applied to it. It is perfectly unimportant whether the company is established by one mode or another, because whether established by Act of Parliament or not it is liable to be wound up, and my opinion is, that the necessary consequence would be, that the Court which has the power of winding-up has the power of doing that which is the necessary consequence of winding-up, namely, dissolving the company under the 111th section. It does not appear to me that that presents any difficulty whatever. I am of opinion, therefore, that this is a company which it is within the powers of the Court to order to be wound up under the Act of Parliament.

Then comes the question, Is it expedient, under all the circumstances, that it should be wound up? The words are, "whenever the Court is of opinion that it is just and equitable that it should

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be wound up." When this matter came before me for the first time on the 20th of December last, seeing the extraordinary difficulties of the case, and seeing the position of the parties, and that they appeared not to be unreasonably disposed towards each other, I suggested—and my suggestion was acquiesced in — that the matter should stand over for a time to see whether the parties who were in conflict could come to some arrangement. These parties, therefore, who are all represented by solicitors of great respectability and experience, all living in the same town of *Bradford*, have had the most ample opportunity of meeting and discussing the matter; and if during these three months they have not been able to make any approach to a settlement, what prospect is there, if I leave them in their present state of confusion, that they will be likely to agree better within the next three months or even within the next three years? I can see none. Therefore my opinion is, that if this order to wind up is refused it will be simply leaving the canal an open trench, utterly useless for the purpose for which it was made, a nuisance to the town; not that kind of nuisance which was prohibited by the order of Vice-Chancellor *Wood*, but a nuisance of another kind, namely, an open trench, useless for all practical purposes, impeding the free passage from one part of the town to the other, and a nuisance in various ways which will present themselves to the mind of any man, in which such a thing as a canal, which is no longer applied to the purpose for which it was made, must, in the nature of things, be a great nuisance. Is it expedient to leave that state of things to continue? It seems that one of the opponents, the Corporation of *Bradford*, have in the interval since this case was before me been negotiating and endeavouring to purchase this canal, and when I heard that they had made an offer of £27,000 I certainly expected that instead of opposing this order they would have been its most active supporters, because if they can purchase without the intervention of the Court they will not less be able to purchase with the intervention of the Court, and if an order to wind up is made, they are much more likely to be able under the direction of the Judge to come to some arrangement than they will be if the matter is left in the state of confusion in which it is now. I am unable therefore to see that the winding-up order can be of the slightest disadvantage to the Corporation of

Bradford. The next opponent is the *Aire and Calder Navigation Company*, who have a very manifest and important interest in this matter. How are their interests likely to be injured by a winding-up order? They have done nothing, they cannot compel the company to do anything. I asked if they or any of the owners of the wharves and places adjoining the canal would undertake the responsibility of applying for a *mandamus* to compel this company to supply the canal with water other than that which they are prohibited from supplying by the injunction of this Court, and none of them would undertake that responsibility. If they had undertaken to apply for a *mandamus* I would have ordered the Petition to stand over until the result of those proceedings was known. But nobody will take any step. What, therefore, will be the result if I refuse the order? The parties will go on bickering and quarrelling about this matter for aught I can see for years. The company are not inclined to go to the expense of getting this additional supply of water; and the question is, are they bound to do so? I have heard the various statements which were made before the Committee of the House of Lords by scientific gentlemen of high standing as to how this thing could be done and how it could not be done, but they all agree in this, that there must be a very large expenditure. None of them put it below £10,000, £12,000, or £13,000, and there must be a considerable annual outlay to make that expenditure useful. Is this company bound to incur that expenditure? Now, Mr. *Glasse* has referred to that which is stated in the Petition, that the *Leeds and Liverpool Canal Company* have offered a rental of £1200 a year, and to lay out all the necessary money to enable them to pump the water from their canal, which is on the lower level, up into this canal. If they had offered to take a perpetual lease, and to bind themselves in perpetuity to pay £1200 annually, and to bear all expenditure, and pump the water up without putting any expense upon this company, I should be very much inclined to say that that was an offer which the company ought to accept. I do not understand the offer to amount to anything of the kind, but if it did, I am unable to see that if an offer of that kind were made in Chambers I should not be able to adopt it. If an order to wind up is made, I should be ready to receive any proposals.

V.-C. M. 1870 *In re* Bradford Navigation Company.

One of the reasons which is urged why I cannot make this order to wind up is, that the Court cannot carry it into complete effect without the aid of Parliament. But this Court makes many orders of that sort. It is the constant course of the Court to make an order that a certain thing shall be done, although it sees it never can be completely carried into effect without the aid of Parliament. It is the constant course of the Court to sanction in Chambers an application to Parliament.

In this case, if I am satisfied that the business of this company has actually come to an end, that there is no rational expectation that they will be able to go on with their business, that they will ever be able to float another boat without a large expenditure, which they are not bound to undergo, why should I allow this state of confusion to be maintained, when by a scheme to be approved of in Chambers the whole thing may be sold? If they have the power of sale it may be done without the aid of Parliament; or if not, when the parties are all before the Judge in Chambers, the various opposing schemes can be softened down under the influence which the Court has, either under the superintendence of the Chief Clerk, or by the matter being brought before the Judge himself, and instead of going to Parliament with a bill on which no tribunal can settle between them the proper course to be taken, they may, before they go to Parliament, be brought together in Chambers, and made to agree upon what ought to be done, and then a bill, settled in Chambers under the sanction of the Court, may be presented to Parliament, and, instead of having a long, severe, and necessarily expensive contest in Parliament, the parties may at one-twentieth of the expense be brought to agree to a bill which may pass through Parliament by consent. I am unable, I confess, therefore, to see that the interest of any one of the parties is likely to be damaged by an order to wind up. On the contrary, it seems to me, seeing as I do see plainly enough, after all that has taken place, that it is all but hopeless to expect, except under the pressure of the Court, to bring this matter to a conclusion, that if I dismiss this Petition everything will be in the most perfect confusion, and ultimately the matter will be brought before the Court again. It is not, therefore, my intention to take from those parties the pressure of the Court, but, considering the

various schemes which have been proposed, after the views I have now expressed, which may perhaps not be entirely without influence, I should suggest to the parties that instead of my making an order now this Petition should stand over till Trinity Term, and then if the parties cannot come to any other conclusion, I will say, without any further argument, whether I do or do not make an order to wind up.

After some discussion, from which it appeared that some of the Respondents objected to the Petition standing over,

The VICE-CHANCELLOR said that he had quite satisfied himself, and that he would at once make the usual winding-up order.

Solicitors for the Petitioners: Messrs. *Evans & Foster.*

Solicitors for the Respondents: Mr. *Cann;* Mr. *Darley;* Mr. *Gratton.*

V.-C. J.

1870

May 31.

HURRY *v.* HURRY.

Will—Tenant for Life and Remainderman—Substitutional Gift to Children—Partition—Sale—Defendant entitled to a small Share, out of the Jurisdiction, and not served—Order for Sale not made—31 & 32 Vict. c. 40.

A testator devised real estate to his wife for life, remainder to his brothers *nominatim*, as tenants in common in fee; "and" in case of the death of either of them in the lifetime of his (testator's) wife, leaving issue, testator devised the share of him so dying to "all his children," as tenants in common in fee; but in case of the death of either of them in the lifetime of his (testator's) wife, without leaving issue living at his death, or leaving such issue, and the same should die under twenty-one, testator gave the share of him so dying to the survivors equally:—

Held, that the gift to the children, though preceded by the word "and," was a substitutional and not an original gift; hence, that those children only of a brother dying in the lifetime of the tenant for life, who survived their father, were entitled to participate in their father's share.

In re Merricks' Trusts explained (1).

In a partition suit, where one of the parties, entitled to a small fraction of the estate, was out of the jurisdiction, and had not been served, and it did not appear that any attempt had been made to serve him:—

Held, that a decree for sale could not, under the *Partition Act*, 1868, be made in his absence.

Further consideration.

William Hurry, by his will, dated the 23rd of December, 1840, made a general devise of real estate to his wife for her life, and continued:—

"And from and after her decease I give and devise the same unto my brothers, *John Hurry*, *Stephen Hurry*, *Thomas Hurry*, and *Henry Hurry*, and my brother-in-law *Thomas Elsum*, to hold to them, their heirs and assigns, for ever, as tenants in common, and not as joint tenants. And in case of the death of either of them in the lifetime of my said wife, leaving lawful issue, I give and devise the share of him so dying to all his children, to hold to them, their heirs and assigns, for ever, as tenants in common, and not as joint tenants. But in the case of the death of any one or more of my said brothers dying in the lifetime of my said wife, without leaving lawful issue living at his or their death, or leaving

(1) Law Rep. 1 Eq. 551.

such issue, and the same shall die under the age of twenty-one years, then and in such case I give and devise the part or share of him so dying unto the survivors of them equally."

Of the persons above named, *John* and *Thomas Hurry*, and *Thomas Elsum*, died in the lifetime of the tenant for life, all leaving children; and on the 6th of August, 1868, this suit was instituted for partition of the estate, the Plaintiffs being the surviving children of *Thomas Hurry* and *Thomas Elsum*, and the Defendants being the surviving brothers, *Stephen* and *Henry Hurry*, the surviving children of *John Hurry*, and a daughter of one of the children of *John Hurry*, who had died in his lifetime.

The result of inquiries in Chambers was, that *John Hurry* had had fourteen children, all of whom attained twenty-one, but of whom nine only survived their father. *Thomas Hurry* had had two children, both of whom were living and of age; and *Thomas Elsum* had had nine children, all of whom attained twenty-one, but of whom only five survived their father.

One of the questions was, whether all the children of *John Hurry* and *Thomas Elsum* were entitled to participate in their respective father's share, or only those who survived their respective fathers—a question which depended on whether the gift to the children was an original or a substitutional gift.

Mr. *Plummer* (Mr. *E. Leigh Pemberton* with him), for the Plaintiffs:—

We submit that only those children of *John Hurry* and *Thomas Elsum* who survived their respective fathers can participate.

Mr. *Arthur Dixon*, for some of the Defendants, including th daughter of the child of *John Hurry*, who died in his lifetime:—

The decision of the Lord Chancellor in *In re Merricks' Trusts* (1) seems to have been considered as an authority for the proposition, that where, after a first gift, a second gift is preceded by the word "and," it is an original and not a substitutional gift. Here the word is "and;" and if the above view be correct, the second gift in this will is an original gift to the children, and the consequence

(1) Law Rep. 1 Eq. 551.

V.-C. J. 1870 ~~ HURRY v. HURRY.

is, that all the children of *John Hurry* and *Thomas Elsum* take, whether they survived their father or not.

The cases were all considered in *Martin* v. *Holgate* (1).

SIR W. M. JAMES, V.C.:—

I do not consider that the remarks of the Lord Chancellor in *In re Merricks' Trusts* (2) warrant the conclusion that every gift which is preceded by the word "and" is an original and not a substitutional gift.

In this instance, I think the gift to the children is clearly substitutional; hence, that those children only take who survived their parents, following the decisions in *Lanphier* v. *Buck* (3), and in *In re Merricks' Trusts.*

Mr. *Crossley*, for the Defendant *William*, one of the sons of *John Hurry*:—

The Chief Clerk has certified that one of the Defendants, *Henry*, a son of *John Hurry*, is out of the jurisdiction. It is believed that he is in *Australia*. He has not been served, and it does not appear that any attempt has been made to serve him. It is submitted, however, that the Court can proceed in his absence. His share is only one-ninth of a fifth.

All parties present concur in asking for a sale.

The VICE-CHANCELLOR, having read the Act, 31 & 32 Vict. c. 40, considered that he could not order a sale in the absence of *Henry Hurry*; and said that he must be served. His Honour ordered the cause to stand over for the Plaintiffs to serve the Defendant *Henry Hurry*, or otherwise bring him before the Court.

Meanwhile, the declaration as to the former question would stand.

Solicitors: Messrs. *Nethersole & Speechly*, agents for Mr. *John Peed, Whittlesea*; Mr. *C. V. Field.*

(1) Law Rep. 1 H. L. 175. (2) Law Rep. 1 Eq. 551.
(3) 2 Dr. & Sm. 484.

In re BROWN'S SETTLEMENT.

V.-C. J.
1870
June 25.

Marriage Settlement—Power of Sale—Exercise of Power of Appointment to Children of the Marriage—Duration of Power.

By a marriage settlement lands were conveyed to the use of trustees and their heirs, upon trusts for husband and wife for life, and in default (which happened) of children of the marriage, for the children of *A.*, as the wife should by deed or will appoint. The settlement contained usual powers of sale and exchange, and reinvestment of the purchase-money in land. The wife, with the concurrence of the husband, appointed and conveyed the lands to and to the use of the trustees and their heirs, upon trust, subject to the life estates, as to four undivided fifths of the lands, for *B.*, *C.*, *D.*, and *E.*, four of the five children of *A.*, and their heirs, as tenants in common; and as to the remaining fifth, for *F.*, the fifth child, for life, with remainder to *B.*, *C.*, *D.*, and *E.*, their heirs and assigns, as tenants in common. *F.* was of unsound mind—not so found by inquisition. *B.*, *C.*, *D.*, *E.*, and *F.* were all living at the date of the original settlement, and were still living; and all, except *F.*, were *sui juris*. The wife having survived her husband:—

Held, that the power of sale in the original settlement was still subsisting over the whole of the lands; and that the trustees of the settlement could make a title to a purchaser.

PETITION.

By the marriage settlement of *William Berry Brown* and *Elizabeth Seear*, dated in 1831, lands were conveyed to the use of trustees, their heirs and assigns, upon trust during the joint lives of husband and wife, to pay the rents to the wife for her separate use, and after the decease of the husband, if the wife should survive (which happened), to her for life, and after her decease upon certain trusts for the benefit of the issue of the marriage; and in case (which happened) there should not be any issue of the marriage, or of the wife by any after-taken husband, then, after the death of the wife, "upon trust for all and every, or such one or more, of the children, grandchildren, or more remote issue respectively of *Robert Johnson* and *Mary Ann* his wife, such grandchildren or other issue being born before such appointment . . . and at such ages or days, and (if more than one) in such proportions, and with such provisions for maintenance, education, and advancement, and subject to such conditions and substitutions in favour of any one or more of the others of the said children, grandchildren,

V.-C. J. 1870 *In re* BROWN'S SETTLEMENT.

and other issue, and either by way of portion and annuity," as *Elizabeth Brown* should, notwithstanding coverture, and whether covert or sole, by deed or will appoint; with remainder upon trust for *Mary Ann Johnson* for life, remainder "upon trust for the children or other issue of the marriage of the said *Mary Ann Johnson* and *Robert Johnson*," as therein mentioned, with ultimate remainder upon trust for *Elizabeth Brown*, her heirs and assigns. The deed contained a power for the trustees for the time being, at the request and by the direction of *E. Brown*, during her life, and after her decease "at their or his discretion and authority, to sell and dispose of, either by way of absolute sale, or exchange for other messuages and hereditaments to be situate in *England* or *Wales*, all or any part of the messuages and hereditaments hereby settled, and the inheritance thereof, in fee simple;" and it was declared that the trustees' receipts should be good discharges; and that "when all or any part of the messuages and other hereditaments hereby made saleable as aforesaid shall be sold for a valuable consideration . . . the said trustees shall, with all convenient speed, lay out and invest all such sums in the purchase of other hereditaments, to be situate in *England* or *Wales*, of a clear indefeasible estate of inheritance in fee simple in possession, or of lands of a leasehold or copyhold tenure convenient to be held therewith, or with the hereditaments hereinbefore settled or to be purchased as aforesaid. . . . And that the said trustees shall settle and assure, or cause to be settled and assured . . . the hereditaments so to be purchased to such and the same uses, upon and for such and the same trusts, intents, and purposes, and with such and the same powers, as are limited, expressed, declared, and contained of and concerning such of the hereditaments hereinbefore mentioned as shall be so sold or exchanged, or as near thereto as the nature and quality of the land so to be purchased, deaths of parties, and other intervening circumstances, will then admit of;" and it was declared "that, until the money to be produced by any sale of the hereditaments hereby made saleable . . . shall be disposed of in manner hereinbefore mentioned, the said trustees, at their discretion, may place out such money in the purchase of a competent share of the Parliamentary stocks or public funds of *Great Britain*, or at interest upon Govern-

ment or real securities in *England* or *Wales*, in the names of such trustees, and may alter, vary, and transpose such stocks, funds, and securities, as they or he shall think fit, and that the interest, dividends, and annual produce arising from such stocks, funds, and securities shall go and be paid in the manner aforesaid to the persons, and for the intents and purposes, unto and for which the rents and profits of the hereditaments so to be purchased therewith would go or be payable or applicable, in case such purchases and settlements thereof as aforesaid were then actually made."

By an indenture dated the 14th of September, 1850, indorsed on the last, and made between *Elizabeth Brown* of the first part, *William Berry Brown* and *Elizabeth* his wife of the second part, the five below-named children of *Robert* and *Mary Ann Johnson*, and the husband of one of them, of the third part, and the trustee of the therein within written indenture of the fourth part, after reciting the death of *Mary Ann Johnson*, and that there were then living five children of the marriage of *Robert* and *Mary Ann Johnson*—namely, *Woodthorpe*, *Edward*, and *Robert Johnson* the younger, *Mary Ann*, wife of *Henry Clarke* (since deceased), and *Elizabeth Seear Johnson*—Mrs. *Brown*, in exercise of the power contained in the settlement, appointed that all the messuages, hereditaments, and premises comprised therein should (without prejudice to the existing life estates) "remain and be held by the trustees" upon the trusts thereinafter declared. She also, with the concurrence of her husband, conveyed the hereditaments to the use of the trustees and their heirs and assigns, by way of confirmation of the appointment; and it was declared that the appointment and grant should operate and enure, and that the trustees, their heirs and assigns, should (subject and without prejudice to the life estates) stand seised of the hereditaments upon trust, as to four undivided fifths of the hereditaments, for *Woodthorpe Johnson*, *Robert Johnson*, the son, *Mary Ann Clarke*, and *Elizabeth Seear Johnson*, their heirs and assigns equally, as tenants in common; and as to the remaining fifth, upon trust for *Edward Johnson* for life, and after his decease, upon trust for the four first-named persons, their heirs and assigns, equally as tenants in common.

All the persons named in this appointment were alive at the date of the original settlement.

V.-C. J. 1870 *In re* BROWN'S SETTLEMENT.

William Berry Brown died on the 30th of January, 1855.

Mrs. *Brown* died on the 9th of February, 1861.

Edward Johnson was of unsound mind, but not so found by inquisition.

Part of the hereditaments were taken in 1869 by the *Metropolitan Board of Works*, and £10,400 had been awarded for the purchase-money, compensation, and damages.

The trustees of the settlement alleged that they had power to carry out the contract for sale, and had shewn (as they said) a good title; but the *Board of Works* alleged that doubts might be entertained whether the power of sale was still subsisting, and they accordingly had paid the £10,400 into Court.

The Petition was presented by the trustees of the settlement, also by the Rev. *Woodthorpe Johnson*, *Robert Johnson*, the son, *Mary Ann Clarke*, widow, *Elizabeth Seear Johnson*, and the trustees of *Robert Johnson's* marriage settlement, praying that the £10,400 might be paid out to the trustees of the settlement; and that the costs and expenses of the Petition, and taking of the lands, and of and incidental to the application, might be paid by the *Board of Works*.

Mr. *Amphlett*, Q.C., and Mr. *V. Hawkins*, for the Petitioners:—

The only question is, whether the power of sale is subsisting. The trustees have sold, and propose to convey under the power, maintaining that it is still in existence.

If the limitations of the appointment had been inserted in the deed of settlement, there probably would have been no doubt; as the case would have been considered to be ruled by the decisions in *Trower* v. *Knightley* (1), and *Taite* v. *Swinstead* (2); the tenant for life of one of the shares being of unsound mind, though not so found.

The only ground of doubt seems to be, whether the circumstances of the limitations having been created by appointment makes any difference. We say it does not; the limitations having the same effect as if they were in the original deed.

[The VICE-CHANCELLOR:—The substantial question seems to

(1) 6 Madd. 134. (2) 26 Beav. 525.

be, whether the fund is to be reinvested by the trustees, or by the Court of Chancery.]

In this instance the trustees, having the legal estate, will convey in their own names; and if the money be paid out to them, they will deal with it as they may be advised.

Mr. *Casson*, for the Respondents, the *Board of Works*:—

The question is, whether the appointment is not a reconveyance of the whole fee; the effect of which would be, to vest the property in the children in one way or the other; in which case the power of sale would be gone.

SIR W. M. JAMES, V.C.:—

In this case, if the children to whom the appointment was made were still infants, the case would have presented greater difficulties. 40 L D 460

I feel there is great force in the argument that directly the property gets into the hands of persons who are able to dispose of it absolutely, the power of sale must be gone. It is like the case of a power which is destructible directly the property vests in a tenant in tail in possession, who can, if he pleases, dispose of the whole estate.

But I must consider the limitations under this appointment exactly as if they had been inserted in the original settlement. That is a safe general rule to act upon; and it must be carried out, whether for good or for evil. If they had been inserted in the original settlement, I think there is sufficient authority to shew that as long as there is a settled estate in any part of the property subsisting, so long must the power remain in existence.

That being so, I think the trustees must take the money, and do with it as they may be advised, and the *Board of Works* must pay the costs.

Order as prayed; costs according to the Act.

Solicitors: Messrs. *Deacon, Son, & Rogers; The Solicitor to the Board of Works.*

V.-C.J.
1870
June 3.

HOLT *v.* CORPORATION OF ROCHDALE.

Landowner and Public Body—Statutory Rights—Sewers—Permanent Trespass —Injunction — Lands Clauses Act — Towns Improvement Clauses Act — Compulsory Powers.

Defendants, the corporation of a borough, were empowered by a special Act (which incorporated the *Towns Improvement Clauses Act*, 1847) to make sewers; but it was provided that it should not be lawful for them to cause any new sewer to open or drain into the river *Roche* at any point above the *Town Mill Weir*. Plaintiffs, the owners in fee of the *Town Mill* and *Weir*, and occupiers of the mill, complained that the Defendants were making a large new sewer in the principal street of the town, and other new sewers, which would open or drain into the river above the weir, and prayed for an injunction to restrain these acts. The evidence shewed that the Defendants had made the large new sewer complained of nearly on the site of an old sewer, but larger and deeper, that several drains had been made into it which could not have been made into the old sewer, and that it was intended to make many more such drains; also that they were making other new sewers, which would drain into the river above the weir:—

Injunction granted to restrain the Defendants from causing or permitting any sewer (omitting the words "or drain") to be opened into the new sewer, or any other new sewer to open or drain into the river at any point above the *Town Mill Weir*.

Defendants were empowered by their special Act from time to time, as they should think proper, to cleanse and otherwise improve the river, and for such purpose "to remove or alter" the *Town Mill Weir*. They had no compulsory powers of taking the weir, but they were empowered to purchase land by agreement, and the Act provided that full compensation should be made to all persons "sustaining any damage" by reason of the exercise of any of the powers of the Act. Defendants, having entered upon the weir and removed part of the same, and having permanently occupied the space by a floodgate, Plaintiffs, not alleging damage, prayed that the Defendants might be restrained from entering upon or continuing in possession of the weir, or any land or property of the Plaintiffs, or any part thereof, and from taking or using the same, without consent of the Plaintiffs:—

Injunction refused, and bill as to this part of the relief dismissed.

THE Plaintiffs, *Sophia Holt*, widow, *Oliver Holt*, and *William Holt*, being owners in fee and occupiers of a dyeing and fulling mill, called "*The Town Mill*," in the town of *Rochdale*, situate on the right bank of the river *Roche*, and of a weir in the river, used for damming-up water to turn the mill-wheels, filed this bill on the 6th of October, 1869, alleging as follows:—

By an Act of 16 & 17 Vict. c. ccxx., called the *Rochdale Improve-*

ment Act, 1853, after reciting that it was expedient that further provision be made for the widening, paving, and altering the streets, "cleansing the river *Roche*," drainage and general improvement of the town, and other purposes, commissioners were appointed, the *Lands Clauses Act* was incorporated, and it was provided (sect. 55) that, "subject to the provisions of this Act, the commissioners may, for the purposes of such alterations, widenings, and improvements, enter upon, take, and use" the lands and houses delineated on certain deposited plans. By sect. 58, the powers of the commissioners for the compulsory purchase of lands for the purposes of the Act were not to be exercised after the expiration of four years after the passing of the Act.

Sect. 59 provided, "that the commissioners from time to time may, by agreement, purchase and rent for any of the purposes of this Act, other than the purposes of the cemetery, any lands within the town."

By sect. 85, the *Towns Improvement Clauses Act*, 1847, except certain sections, was incorporated.

Sect. 95 provided, "that the commissioners from time to time may turn, tunnel, cover, or otherwise alter, as they think fit, any gutter or channel in any street within the town."

Sect. 96 was as follows:—"Provided always, that it shall not be lawful for the commissioners . . . . to cause any new sewer to open or drain into the river *Roche* at any point above the *Town Mill Weir*, or to allow any new sewer to open or drain into the stream called the *Lordburn*."

Sect. 97 provided, "that the commissioners from time to time, as they think proper, may cleanse and otherwise improve the river *Roche* within the town, and for such purpose may remove or alter the *Town Mill Weir* on that river, and erect such other proper and sufficient works as may be requisite, and those works shall be erected and for ever maintained and repaired by the commissioners in manner and form proper and sufficient to retain at all times (except between seven and twelve o'clock in the evening of every working-day in the week, and also during general or statutory holidays) the water of the river immediately above them at a level not lower than the bottom of the present pen trough of the *Town Mill* . . . ."

V.-C. J. 1870 HOLT v. CORPORATION OF ROCHDALE.

The *Town Mill Weir* was not included in the deposited plans, or in the book of reference.

Sect. 98 provided, "that full compensation shall be made, out of the rates levied under this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act relating to the cleansing or otherwise improving the river *Roche;* and the amount of such compensation, in case of difference, shall be ascertained according to the provisions in that behalf of the *Lands Clauses Consolidation Act*, 1845."

The powers, rights, property, and liabilities of the commissioners were afterwards transferred to the corporation of the borough of *Rochdale.*

The bill stated (par. 7), that notwithstanding the prohibition contained in the 96th section, the Defendants, the corporation, had at different times made several new sewers to open or drain into the river *Roche* above the *Town Mill Weir*, and had allowed such new sewers, or some of them, to open or drain into the stream called the *Lordburn;* that the Defendants were now making a large sewer in the principal street of *Rochdale*, called *Yorkshire Street*, which sewer would open or drain into the river above the weir; and that the Defendants threatened and intended to connect with the last-mentioned sewer drains from the shops and houses in *Yorkshire Street.*

On the 17th of September, 1869, the Plaintiffs' solicitors served the town clerk and surveyor with notice to discontinue the above work.

The bill charged that if the Defendants were permitted to cause the new sewer to drain into the river, they would "occasion a nuisance to, and inflict a serious injury upon, the aforesaid property of the Plaintiffs."

On the 4th of September, 1869, the Defendants served the Plaintiffs with notice of their intention, acting in execution of the *Rochdale Improvement Act*, 1853, to enter upon the *Town Mill Weir*, after the expiration of twenty-four hours from the time of the Plaintiffs receiving the notice, "for the purpose of altering such weir, and erecting such other proper and sufficient works" as might be "requisite for cleansing and otherwise improving the river. . ."

The Plaintiffs' solicitors, on the 4th of September, 1869, wrote complaining that the notice was "unreasonably short," as well as "vague and indefinite in its terms as to the precise day and hour" when the works would be commenced, and protested against the corporation exercising any power it might imagine it possessed "in such an arbitrary and unreasonable manner as proposed, without their consent being first obtained."

The bill charged that the Defendants, by making their contemplated alteration in the weir, would be in effect "taking and permanently using" the Plaintiffs' land and property without their consent first had and obtained, and without giving to the Plaintiffs any such notice, or paying or securing to them any such purchase-money and compensation, as by the *Lands Clauses Act* they were bound to give.

The bill prayed (par. 1) for an injunction to restrain the corporation "from causing or permitting the said new sewer now making by them in *Yorkshire Street, Rochdale*, aforesaid, or any other new sewer, to open or drain into the river *Roche*, at any point above the said *Town Mill Weir*, and from allowing any new sewer to open or drain into the said stream called the *Lordburn*;" also (par. 2) for an injunction to restrain the corporation "from entering upon or continuing in possession of the said *Town Mill Weir*, or any land or property of the Plaintiffs, or any part thereof, and from taking or using the same without the consent of the Plaintiffs first had and obtained;" and for damages.

The injunctions were moved for on the 9th of October, and on that day the Vice-Chancellor granted an interim injunction, extending over the 11th of November, in the terms of the 1st paragraph of the prayer. His Honour did not see sufficient ground for interfering with the Defendants' statutory power as to the weir.

From the evidence it appeared that for many years there had been an old sewer in *Yorkshire Street*, which had become out of repair, and insufficient for the increased requirements of the town. In 1848, the Defendants commenced, and since the filing of the bill had completed, the construction of a new sewer (now complained of), which was larger than the old one, following as nearly as was convenient the course of the old sewer, but at a rather

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greater depth. It was admitted that a few new drains from the backs of houses and cellars had been already made into the new sewer; and it was alleged, and not denied, that several new sewers were being constructed in the town, and that no provision had been made for causing any new sewers to fall or drain otherwise than into the river above the weir. It was shewn also that some drains from houses which might have been but were not drained into the sewer formerly had been recently made, with the acquiescence of the Plaintiffs, into the *Yorkshire Street* sewer. As to the weir, the evidence shewed that the Defendants, since the filing of the bill, had entered upon the weir, removed the stonework of a part of it for a space of about thirty-one feet long by from fifteen to twenty feet broad, excavated this portion to below the bottom, laid a floor, erected side-walls of stone, and put up a floodgate of 407 square feet in size.

On the 18th of November an injunction was granted to restrain the Defendants "from causing or permitting any sewer or drain to be opened into the new sewer in *Yorkshire Street*, or any other new sewer to open or drain into the river *Roche*, at any point above the *Town Mill Weir*, and from allowing any new sewer to open or drain into the *Lordburn*," until the hearing of the cause, or further order.

The cause now came on upon motion for decree.

On behalf of the Plaintiffs, Mr. *Edward Norman Macdougall*, a surveyor, deposed that the old sewer was about four feet only below the surface. He said: "The new sewer is laid at a depth averaging about twelve feet, and is sufficiently low to drain the back-premises and the cellars of the houses in and adjacent to *Yorkshire Street*, which the old drain would not do; and it is also available for receiving the sewage of the sewers in the neighbouring streets and houses north of *Yorkshire Street*, some of which streets are not yet drained, or only partially so, and which could not have been effectually drained into the old sewer in *Yorkshire Street*. The new sewer in that street is now one of the main arterial drains of the town."

It was deposed that there were about 9500 dwelling-houses in the town, of which not more than 351 had waterclosets connected with the sewers.

Mr. *Kay*, Q.C., and Mr. *Fischer*, for the Plaintiffs:—

The relief is prayed solely on the ground of injury to private property; and the questions turn mainly on the construction of the statutes.

The VICE-CHANCELLOR said he was with the Plaintiffs on the first injunction.

Mr. *Kay*:—Then as to the weir.

The VICE-CHANCELLOR:—Have I any right to interfere? If you are right, they are the merest wrongdoers in the world.

Mr. *Kay*:—The obstruction they have raised is now part of our freehold. They have taken away a portion, and supplied its place with another portion. It could not have been the intention of the Legislature that they should take our land without paying for it: *Kerr* on Injunctions (1); referring to *River Dun Navigation Company* v. *North Midland Railway Company* (2); *Simpson* v. *South Staffordshire Railway Company* (3).

The VICE-CHANCELLOR:—Your case involves this: that you were entitled to charge them your own price, say £100,000, for what they wanted to do.

Mr. *Kay*:—Undoubtedly; they are not compelled to cleanse the river immediately, or to come to our weir at once. These Acts must be read in favour of the landowner.

The compensation under the *Lands Clauses Act*, referred to in the 98th section, is compensation for consequential damage—for damage to other lands than those taken; it does not mean purchase-money of the freehold.

The VICE-CHANCELLOR:—I do not see that they are compelled to buy the land. They have power to take the easement.

Mr. *Fischer*:—Damage is one thing, dispossession is another. This erection is a permanent occupation of our freehold: *Webb* v. *Manchester and Leeds Railway Company* (4); *Tinkler* v. *Wandsworth District Board of Works* (5).

(1) Page 295.
(2) 1 Railw. Cas. 135, 154.
(3) 34 L. J. (Ch.) 380.
(4) 4 My. & Cr. 116.
(5) 2 De. G. & J. 261.

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The VICE-CHANCELLOR said he proposed to continue the injunction in the terms already granted on the 18th of November (except as to the river *Lordburn*); to dismiss the bill so far as it related to the weir; and to give no costs on either side.

Mr. *Little*, Q.C., and Mr. *North*, for the Defendants:—

The bill should be dismissed altogether, with costs. It prays in substance three injunctions: first, a special injunction as to the sewer in *Yorkshire Street;* then an injunction to prevent any other new sewer from draining into the river above the weir; and, thirdly, as to the weir.

The bill is filed by a private landowner. It does not aver that the corporation are about to make any new sewers; it only says they have made sewers, and we admit we have, and with their consent. The Plaintiffs allege no prospective damage: *Kerr* on Injunctions (1).

Again, it is not sufficient on this bill, not being an information by the Attorney-General, to shew that the act is wrong; it must be shewn to have been done to the Plaintiffs' private wrong. "No one but the Attorney-General, on behalf of the public, has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers conferred on him by the Legislature": *Ware* v. *Regent's Canal Company* (2); *Stockport Waterworks Company* v. *Corporation of Manchester* (3). This disposes of the suit, except as to the *Yorkshire Street* sewer.

As to this, the evidence shews no lengthening, only a widening and deepening, and the present additional drainage is only from two or three cellars or backyards. The Court will not interfere if the damage is inappreciable: *Kerr* on Injunctions (4).

The *Towns Improvement Clauses Act*, 1847 (10 & 11 Vict. c. 34), has a class of sections headed, "And with respect to making and maintaining the public sewers, be it enacted," &c. Then, by sect. 24, the commissioners are empowered to make "such main and other sewers as shall be necessary for the effectual draining of the town or district;" and by sect. 25 they are empowered from time to time, as they see fit, to "enlarge, alter, arch over, and

(1) Page 339.
(2) 3 De G. & J. 212, 228.
(3) 9 Jur. (N.S.) 266.
(4) Page 278.

otherwise improve, all or any of the sewers vested in them." By sect. 28, the expense of making "any new sewer" is to be defrayed by special sewer rates, to be levied on the occupiers within the drainage district in which such sewer is situated, as distinguished from repairs of old sewers, which are defrayed by the general rate. What we have been doing is, to enlarge an existing sewer under the 25th section, not to make a new sewer; in other words, to benefit only those persons who were benefited before.

Even as to the two or three additional drains, the Court will not weigh the evidence with the same nicety as it would in a case between two adjoining private owners. The Court must be satisfied that injury will follow from the operations complained of before it will interfere: *Haines* v. *Taylor* (1); *Attorney-General* v. *Mayor of Kingston* (2).

To grant an injunction would be tantamount to an adjudication that our statutory powers have been exceeded; and to grant an injunction before damage is to obliterate the distinction between an existing and a non-existing grievance.

The VICE-CHANCELLOR thought the words "or drain" must be struck out of this order. There seemed nothing to prevent the Defendants from making new drains to the old houses.

Mr. *Kay*, in reply, on this point only.

SIR W. M. JAMES, V.C.:—

In this case the Plaintiffs have filed their bill, seeking to interfere with two subject-matters: one, the sewage of the town of *Rochdale;* and the other a weir, called the *Town Mill Weir*, to which the Plaintiffs are entitled.

The case of the Plaintiffs, in respect of both heads, is not the ordinary case of nuisance affecting health, or life, or anything of that kind; it is not a case in which the Court is asked to interfere upon the common-law right which everybody has to have his air and water kept pure; but the complaint, as to each of the two heads, is based entirely upon the statutory right which is reserved and given to the Plaintiffs.

(1) 2 Ph. 209. (2) 34 L. J. (Ch.) 481.

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The Plaintiffs allege, and have proved, that they are the owners of a certain mill and weir, and of the bed and soil of the river at the place where that weir is, and for some distance on each side of it, with the exception of some land belonging to a Mr. *Ashworth*; that they are what are called riparian proprietors, and not merely riparian proprietors, but proprietors of the bed and soil, as far as I can make out, of that part of the river. Therefore they have a right of property, and have clearly a right to say to anybody, without any question of the amount or degree of nuisance, "You must not turn a stream of water, whether it be clear or turbid, foul or pure, against my will, into my land." It stands in that way, unless of course there is authority given for them to do it.

Then they say, "You have made several sewers, by which you have drained several streams of water into my property, and you have begun one particular sewer, a very large one, called the *Yorkshire Street* sewer, which will bring a great deal of water into my land, and you have no right to do that."

The Defendants, the corporation, say they have been doing that in the exercise of their statutory powers; that they had power to make sewers, and to make and execute other works for the purpose of properly sewering the town of *Rochdale*.

But then in that Act of Parliament there are contained these words: "That it shall not be lawful for them" (that is the commissioners, now represented by the corporation) "to cause any new sewer to open or drain into the river *Roche* at any point above the *Town Mill Weir*, or to allow any new sewer to open or drain into the stream called the *Lordburn*." There is no qualification in it. They are not to cause any new sewer to open or drain into the river *Roche* at any point above the *Town Mill Weir*.

The Plaintiffs say, further: "We are the proprietors of the river *Roche* above the *Town Mill Weir*, and you have no right to open a sewer or drain into the river at any point above the *Town Mill Weir*" (that means at any point near their property), and they ask that that prohibition be enforced.

Upon that, the Defendants say: "Although you have said that that new sewer will damage you, you have not said that the old ones have damaged you, or will damage you. You have no doubt

introduced, by way of narrative" (for that is the way in which Mr. *Little* puts it), "into your bill a statement that this Act has been from time to time violated by the making of new drains into the river *Roche;* but you have not gone on to say that those new drains have done you any mischief, and you have not gone on to say that you apprehend that new ones are going to be made, although true it is you have said something of the kind with respect to the *Yorkshire Street* drain." But then, with regard to that, it stands in this curious position. It is said: "It is not a new sewer at all, but it is a sewer which substantially represents the old sewer. It is true it is made of very much larger capacity, and it is made much deeper; but, notwithstanding that, it is the old sewer, and it being only a new enlarged sewer substituted for the old sewer, you have no right to interfere with us under the Act of Parliament." It is said, "If you could make out a common law case it would be different, but you have no right to interfere with me under the Act of Parliament, because the Act of Parliament merely says you must not cause a new sewer to be made, and this is not a new sewer."

I think I cannot accede to that argument. I think it is a new sewer, because it is not merely an improvement of the old one—not a mere alteration; but, according to the evidence—which does not seem to me to be substantially controverted—instead of being a street sewer, according to Mr. *Macdougall's* account, it is really formed, and made available (being much larger) for receiving the sewage of the sewers in the neighbouring streets, and the houses which could not have been drained otherwise into the old sewer in *Yorkshire Street;* and he says that that new sewer in the street is now one of the main arterial drains of the town. There is an affidavit afterwards put in by the corporation surveyor, who does not in the slightest degree take any notice of that averment. I think, therefore, it must be considered to be substantially, in that sense, a new sewer, and that there is sufficient evidence of danger that it will be used, as Mr. *Macdougall* describes it, as part of a system of arterial drainage.

It is also, I think, sufficiently averred that other sewers draining into the river have been made. That being so, other sewers having been made draining into the river in violation of the Act of Parlia-

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ment, and this one having been made, it appears to me, as a new sewer, evidently intended and contemplated to be in violation of the Act of Parliament, there is sufficient made out on the evidence to justify me in granting an injunction—not to interfere with anything that has been done, having regard to the mode in which it was done, with the knowledge of the Plaintiffs—but, in the terms of the interlocutory order which I have already pronounced, leaving out the words "or drain;" that is to say, an injunction restraining the Defendants "from causing or permitting any new sewer to be opened into the sewer in *Yorkshire Street, Rochdale,* or any other" (following the words of the Act of Parliament) "new sewer to open or drain into the river *Roche* at any point above the *Town Mill Weir,* in the said bill mentioned."

I do not interfere at all with the stream called the *Lordburn.* I do not know what right of property the Plaintiffs have in respect of that, unless they can bring it within the terms of the order. Of course, if anything is done, by means of the *Lordburn,* which will make it the opening of a new sewer draining into the river *Roche* above their mill, then it would be protected by the injunction; if not, it will not.

I leave out the words "or drain" in that part, because I think, on the evidence, that there is no reason to suppose there would be any substantial difference made by the new sewer in that respect; that is to say, although it is new for some purposes, it is at the same time old for a great many other purposes. It is the sewer of *Yorkshire Street,* and if the sewer of *Yorkshire Street* had remained there, I could not have interfered, as it seems to me, under the Act of Parliament, with any communications being made between the houses in *Yorkshire Street* and that sewer; that is to say, the sewer would have been still serving the purposes for which it was in existence and intended to be used at the time the Act of Parliament was passed. The Act does not say, "You shall not cause any additional sewage to go into the river *Roche;*" it only says, "You shall not cause any additional sewer to be made," which, I think, means a public sewer, made by the commissioners as such. That being so, I think I cannot interfere by injunction to prevent a house from draining into the new sewer, that house being in the street drained by the old sewer, and which would have drained

into the old sewer. I therefore take out the words "or drain," and leave "from causing or permitting any new sewer to be opened into the sewer in *Yorkshire Street*," and so on.

Then, with regard to the other part of the case, as to the weir, it does appear to be a reasonably plain case, that there has been no wrong done. Certainly, if there has been any wrong, there has been no wrong with which this Court has anything to do. The Act of Parliament makes a special provision with respect to this particular thing. It does not leave it to the *Lands Clauses Act*, the *Companies Clauses Act*, or the *Towns Improvement Clauses Act;* but says this: "That the commissioners, from time to time as they think proper, may cleanse and otherwise improve the river *Roche* within the town, and for such purpose may remove or alter the *Town Mill Weir* on that river, and erect such other proper and sufficient works as may be requisite." Then they are to do something with regard to those works which is at all times to retain the level of the water at the same height as it is now for the benefit of the mill, except during all statutory holidays, or at night-time, during which time I suppose it was thought by the Legislature that the mill would not, or ought not to, be at work.

Then it is suggested: "Although the commissioners are to do that, yet it must mean only that they are to be authorized to spend their money in doing it, as between them and their ratepayers; it could never have been intended that they were to take a man's property, or interfere with a man's property, without paying him; therefore it must be always read with the understanding that the man is to have his property compensated for in the manner provided by the *Lands Clauses Act*." That would be, in truth, to say that this work, which is a great public work, for the public health, was to be entirely dependent upon the caprice of the landowner; in other words, that any landowner whose property was in the slightest degree affected by these words might say, "I will not allow it unless you pay me any ransom I think fit to exact." That is not a very probable intention to impute to the Legislature.

Again, it appears to me that the 98th section provides entirely for what is to be done in that state of facts. This is a special thing. You do not want to buy the land; you do not want to rent

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the land; you are not to interfere permanently with the only purpose for which the weir is made—that is to say, you are not to interfere permanently with the level of the water by which the mill is to be supplied; but it is possible that, without even renting the land, or purchasing it, compensation may be payable, because you may do damage, and if you do damage, then you must make full compensation out of the rates levied under the Act for any damage whatever which may be sustained, not from the exercise of any of the powers of the Act, but "by reason of the exercise of any of the powers of this Act relating to the cleansing or otherwise improving the river *Roche;* and the amount of such compensation, in case of difference, shall be ascertained according to the provisions in that behalf of the *Lands Clauses Consolidation Act*, 1845."

Another Act, the General Act, has been read to me for another purpose. I observed that there were some clauses in that Act which threw a great light upon the matter. The *Towns Improvement Clauses Act* is incorporated in this Act; and there, where property is not taken permanently, exactly the same thing is done—namely, the commissioners are authorized to make sewers through the street and through cellars, making compensation to the person through whose lands they are taken. They are not obliged to buy or take the land for that purpose, but they are simply obliged to make compensation, treating the thing not as the acquisition of land or the purchase of land, but as an easement given for certain public purposes.

I am of opinion, therefore, that upon that part of the case, which is at least one full half of it, the Plaintiffs have failed. Upon the other part of the case they have succeeded upon a strict legal right, which they are entitled to come here and have enforced, and which, probably, it would be for the benefit of the town of *Rochdale* to have declared now. They have succeeded in having it declared that the Defendants must not go beyond the limits of the powers contained in their Act of Parliament. As to one half they have succeeded, and as to the other half they have failed. There will be that modified injunction which I have indicated; and setting off the one half against the other, there will be no costs of the suit on either side.

That part of the bill which relates to the relief as to the *Town Mill Weir* will be dismissed.

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Solicitors for the Plaintiffs: Messrs. *Belfrage & Middleton*, agents for Messrs. *Buckley & Heap, Rochdale.*

Solicitors for the Defendants: Messrs. *Norris, Allens, & Carter*, agents for Mr. *Mellor, Rochdale.*

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1870
June 3.

Maintenance—Master and Servant—Jurisdiction of Court of Equity.

A secretary of a company was prosecuted by a shareholder for issuing, in his capacity as secretary, a false balance-sheet. The prosecution failed, and the secretary was maintained in an action for malicious prosecution against the shareholder (in which he obtained a verdict for £50 damages) by a resolution of the directors authorizing the secretary to instruct the company's solicitors to take such proceedings, at the company's expense, with reference to the prosecution as they might be advised. It was admitted that the fact of the maintenance, though known to the parties in the action, would not have been a good plea:—

The Court refused, at the suit of the shareholder, to restrain the taxation of costs, and subsequent proceedings in the action, and left the question of maintenance to be dealt with by the court of law.

Quære, in what cases a master is entitled to maintain litigation by his servant.

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DEMURRER AND ANSWER.

The bill was filed by *Alfred Elborough* against *Edmund Ayres*, the secretary, five persons named *Charles Seale Hayne*, Sir *John Campbell Lees, George Nelson Strawbridge, Henry Doughty Browne*, and *Edward Wright*, directors of the *Northern Railway of Buenos Ayres Company, Limited*, and *John Morris, Thomas Morton Harvey*, and *George Davis*, members of the firm of *Ashurst, Morris, & Co.*, solicitors.

The bill stated that on the 16th of October, 1868, the Plaintiff, being a shareholder in the company, laid an information before the Lord Mayor of *London*, and in support thereof deposed to the effect that the Defendant *Ayres* had made and circulated a false

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balance-sheet and statement of accounts, with intent to deceive or defraud the members of the company, contrary to the statute, 24 & 25 Vict. c. 96, s. 84; that upon the depositions so made by the Plaintiff, and by an accountant, a summons was ordered to be issued against *Ayres;* that on the 28th of October the summons came on for hearing; that the facts stated in the depositions were not disproved, but it was stated on *Ayres'* behalf, as the fact was, that the matters referred to in the information were awaiting decision in the Court of Chancery; that, mainly in consequence of such statement, the summons was dismissed without costs; that the suit referred to at such hearing became abated by the death of the Plaintiff before decree, and had since, in consequence of such abatement, been dismissed without costs; that on the 10th of December, 1868, the five above-named Defendants, sitting as directors, passed the following resolution:—"That Mr. *Ayres* have the permission of the board to instruct the solicitors of the company to take such proceedings, at the expense of the company, with reference to the recent prosecution of Mr. *Ayres* at the *Mansion House,* as counsel may advise;" that neither the memorandum nor articles of association of the company conferred any power on the directors to pass such a resolution, and that, so far as the resolution purported to be passed by them, it was altogether *ultrà vires;* that the Defendants, the solicitors, were then and now the solicitors of the company; that the Defendant *John Morris* was present when the resolution was passed, and the same was passed at his instigation and by his advice; that no instructions were given by *Ayres* to *Morris,* or his firm, to take any proceedings; but that *Morris,* depending on the resolution alone, on the 15th of December, 1868, caused a writ to be issued in an action in which *Ayres* was Plaintiff, and *Elborough* Defendant; that such action came on for trial on the 24th of February, 1870, and a verdict for £50 damages was given for *Ayres;* that the costs in such action had been charged by *Ashurst, Morris, & Co.* against the company; that they had not charged any part of the costs to *Ayres,* or to any account to which he was liable; that *Ashurst, Morris, & Co.* had never been retained by *Ayres,* and the action had been commenced and carried on by *Ashurst, Morris, & Co.* under the direction of the directors, and under no other directions; and that *Ashurst, Morris, & Co.* had

carried into the Taxing Master's office a bill of costs amounting to over £850.

The bill charged that the Defendants, the directors, had no power to maintain the action; that they had maintained it as individuals only, and had thereby committed a wrong against the Plaintiff; and that the Plaintiff had been put to great cost and expense by such wrongful action of the Defendants.

The bill prayed that an account might be taken of the costs, charges, and expenses incurred by the Plaintiff in consequence of the wrongful maintenance of the action; that the Defendants, or some of them, might be ordered to pay to the Plaintiff the amount so ascertained; for an injunction to restrain *Ayres*, and *Ashurst, Morris, & Co.*, from proceeding with the taxation of the bill of costs; for an injunction to restrain *Ashurst, Morris, & Co.*, and *Ayres*, from issuing any process of execution in respect of, or taking any proceedings to enforce payment from the Plaintiff of the bill of costs, or any part thereof, and for the costs of the suit.

To so much of this bill as sought the relief prayed thereby, all the Defendants demurred; and answered as to the rest.

A motion was made for the injunctions, and the same were granted by the Court, under the circumstances mentioned in the judgment below.

The VICE-CHANCELLOR said he would hear the case on demurrer first.

Mr. *Kay*, Q.C., and Mr. *Locock Webb*, for the Defendants, were not called upon.

Mr. *Eddis*, Q.C., and Mr. *E. C. Willis*, for the bill:—

The fact of the action having been maintained by the directors is indisputable. The case is therefore clear, unless it be held that the ordinary rules as to maintenance do not apply, on the ground of *Ayres* having been a servant of the company.

The VICE-CHANCELLOR:—What jurisdiction have I to say what costs a man shall get at common law? How can this Court have any equity to say a man shall have more costs than a court of law would award him?

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Mr. *Eddis*:—The equity lies in this, that the contract was an illegal contract; but the court of law looks at the action as an action by *Ayres* only. It has no means of inquiring into or ascertaining the facts about the contract.

There is no doubt that *Ayres* was secretary of the company, and it is charged in the bill as a fact, and, so far as it is a matter of fact, the demurrer admits that the directors were not authorized as between themselves and the company in passing the resolution; in other words, that it was *ultrà vires*, and hence that the maintenance was the act, not of the company, but of the directors.

But assuming that the relation of servant and master subsisted between *Ayres* and the Defendants the directors, how does the matter stand?

The law is thus laid down in *Viner's* Abridgment (1):—"The master may maintain the quarrel of his servant; may give money for him, 'if any of his salary be in his hands;'" and (2) "In *præcipe quod reddat* against servant, master cannot expend his own money, because this action may proceed without loss of service, but out of the wages he may; but where 'debt' or 'trespass' is brought against the servant, it is otherwise, for fear of losing his service." The result is, that a master may maintain the action of a servant, first, out of moneys of the servant in his hands; or, secondly, where there is risk of the master losing the services through attachment or otherwise. Neither of these exceptions applies to this case.

Those cases in which it may be supposed that Government is permitted to maintain the action of a public servant, are, strictly speaking, cases in which the Government is suing as principal, and the action is not the servant's action at all.

In this instance *Ayres'* action was for malicious prosecution; it was brought to clear his own character, and the cause of quarrel was not in any way the cause of the master.

The VICE-CHANCELLOR:—There is no case given in *Viner's* Abridgment shewing that maintenance by the master is unlawful where the act of the servant in respect of which the action is

(1) "Maintenance" (K) "Master for Servant." (2) Ibid, Note.

brought was a ministerial act—something done by him in, or arising out of, his character of servant.

Mr. *Eddis*:—Agency must be established in order to make the maintenance justifiable. In *Wallis* v. *Duke of Portland* (1) Lord Chancellor *Loughborough* defines maintenance as "an engagement between two parties to the injury and oppression of a third," and says that "statutes prohibiting particular species of maintenance add penalties; but it is laid down as a fundamental authority, that maintenance is not *malum prohibitum*, but *malum in se*; that parties shall not by their countenance aid the prosecution of suits of any kind, which every person must bring upon his own bottom and at his own expense."

The cases referred to in *Viner* are cases in which the master is assisting the defence, not the prosecution (as here), of the action.

The VICE-CHANCELLOR asked for an authority shewing that a court of equity has ever interfered.

Mr. *Eddis*:—If the question of maintenance can be sufficiently raised in the declaration, there is, no doubt, no case in equity. But the right of action here in no way depends upon or arises out of the contract of maintenance. If the right of the Plaintiff, in respect of which he sues, is derived under a title founded on champerty or maintenance, the Court will hold the suit of the Plaintiff to have failed: *Hilton* v. *Woods* (2), and the cases there cited. But here a plea of the illegal contract would be no bar to the action.

The VICE-CHANCELLOR:—The court of law is quite competent to decide what amount of costs *Ayres* is entitled to recover. The consequence, whatever it may be, of maintenance is a question to be tried at law.

Mr. *Eddis* and Mr. *Willis*:—

The course of proceeding at law would be this:—When *Elborough* had paid the whole bill in obedience to the judgment, he might proceed by a separate action against the individual who had

(1) 3 Ves. 494, 502. (2) Law Rep. 4 Eq. 432, 439.

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injured him. The Court will interfere, if only to avoid circuity of action.

Upon demurrer, it must be taken as true that *Ashurst, Morris, & Co.* took their instructions wholly from the company, and not from *Ayres*. The object was to give to the company the benefit of the action against *Ayres;* and the result will be to make Mr. *Elborough* pay all the costs, for not one penny of which the solicitors hold *Ayres* to be liable.

[They also referred to *Williams* v. *Roberts* (1); and *Hawkins'* Pleas of the Crown (2).]

SIR W. M. JAMES, V.C.:—

When the first *ex parte* application was made to me in this case, I expressed a very strong opinion that the bill was entirely novel, and could hardly be sustained. But upon very strong pressure being put upon me, that I should only be delaying the action for twenty-four hours, and that the whole matter might then be fully argued, I consented to grant an interim injunction extending over those twenty-four hours, with the view of bringing the motion on to be heard on the seal-day; at the same time, however, taking the somewhat unusual precaution of making the solicitor for the Plaintiff enter into a personal undertaking that no advantage should be taken of the delay to prevent the execution from having its proper effect.

I am of opinion now that there is no case here for the interference of a court of equity.

The case is simply this: A gentleman of the name of *Ayres* has brought an action against a Mr. *Elborough* for malicious prosecution; he has recovered a verdict for £50 in that action, and he is entitled, according to the practice at common law, to the £50, and to his taxed costs in the action. But it is said that when he brought that action he was backed up in it by an illegal resolution of certain directors, in which the solicitor of the company in fact joined —the solicitor who was the attorney in the action—and that that illegal resolution amounts at common law to the offence of maintenance. That was a matter perfectly well known in the action.

(1) 8 Hare, 315. (2) Ed. of 1824, vol. i. p. 455.

It is admitted, in fact, that as the action was Mr. *Ayres'* action, he would be entitled to the damages; and the fact that he was assisted illegally, if he was assisted illegally, it is admitted, would not be any plea or answer to the action at law. I apprehend that it clearly would have been no ground for interference by this Court to prevent the action from going on.

I recollect there was a case of something of the same kind many years ago in this Court. There was a case of *Evans* v. *Prothero*, in which I was engaged during many years of my professional life; and in one of the many phases of that case, I made a similar attempt before the Vice-Chancellor *Wigram*. The case is not reported upon that point. There the real Plaintiff was a person who had bought a contested title from an administrator, and having bought it, he brought an ejectment in his own name. The Defendants succeeded in the Court of Common Pleas in getting rid of the verdict in that action, upon the ground that it was the action of a person who had bought it by a contract of champerty and maintenance. Then this course was adopted. A new action was immediately brought in the name of the vendor, but, of course, by the purchaser. I applied to Vice-Chancellor *Wigram* to stay that action upon the ground that it was a fraud—that, as the law did not allow a man to buy a contested title and bring an action in his own name, it would not allow him to get rid of the difficulty by bringing an action in the name of the vendor; and I must say I thought I had good ground for the argument. However, it was not acceded to.

In this case, whether what has taken place here does or does not amount to maintenance, is a thing on which I am not going to express any opinion. It appears to me, however, that such a transaction as this would require to be very carefully considered, whether by this Court or by a court of law, before it came to the conclusion that it was a transaction of maintenance. Cases have been referred to in which it has been held that a master may, under special circumstances, and only under special circumstances, support his servant's litigation. But none of those are cases in which the whole thing arose out of the relation of master and servant.

In this case the Plaintiff at law, Mr. *Ayres*, was in fact made

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the subject of a prosecution, by reason of something done by him as secretary of the company. He had issued a certain statement of accounts or balance-sheet, which of course he had done as secretary of the company, and, it must be assumed, with the knowledge and sanction of the directors of the company. At all events, he was made the subject of an application to the Lord Mayor, on the ground of a misdemeanour in respect of that which he had done as secretary of the company. That came to nothing, and the application was dismissed by the Lord Mayor, apparently upon a ground somewhat in the nature of a demurrer, that the whole thing was at that time before this Court, and that this Court could deal with it. That is the statement in the bill. After that, Mr. *Ayres* was minded—and it seems to me very naturally and reasonably minded, as he had been the subject of a prosecution of this kind—to bring an action for malicious prosecution. It appears to me, then, it was not unreasonable—certainly it does not strike one as being in itself morally wrong—that the directors should meet and pass a resolution, and say: "As you have incurred all this in our service, we will not put you to the expense and risk of litigation, but we will take upon ourselves the duty of instructing our solicitor to proceed for you." It is said that that was illegal as between the directors and the company, but that is a matter with which I have nothing at all to do. The directors, at all events, instructed the solicitor, and the solicitor accepted instructions from them, to take proceedings in the name of *Ayres*, just as, it appears to me, the thing must have occurred very commonly in rural life. A country squire, if his gamekeeper or bailiff has been made the subject of proceedings of this kind, brings an action in the name of the gamekeeper or bailiff; and I think many a country gentleman would be very much startled to find that he had been guilty of an offence if he had simply taken up his servant's cause for something which the servant had been exposed to in his service. However, it does not appear to me necessary that I should express any conclusive opinion upon that point, because it does not seem to me to be necessary for the decision of this case.

What I have been looking for, during the whole of the argument which has been addressed to me very forcibly by the counsel

for the Plaintiff, is something like an authority or principle for the interference of this Court in the matter. It is said that this was wrong—this was a constructive fraud. But the Plaintiff is entitled at law to a verdict for £50. The offence, if it be an offence at all, is an offence at law—it is not an equitable offence. It is a common law or statutable offence of maintenance, if maintenance there be. If that is in any way a defence to the action, or a ground for interference with the action, that is clearly a legal matter. Then, as the result of the verdict, Mr. *Ayres* is entitled to his taxed costs. What the amount of the costs to be allowed is, seems to me to be exclusively and essentially a matter for the Court of common law itself to deal with.

Then it is said, "You are allowing a man to receive costs although he has never incurred those costs." If that be so, that again seems to me to be essentially a matter for the court of common law to consider. Are they really *bonâ fide* costs which he is entitled to, according to the true meaning of the Act of Parliament, which says that in certain cases a man shall have his costs? Take the case of a man claiming £50 for a professional witness, who came for nothing, and never intended to receive anything. That would surely be a matter for the Taxing Master, subject to the revision of the Court. So it appears to me that this bill asks me to interfere with the Court of common law in a matter peculiarly and exclusively within its jurisdiction, that is to say, the amount of costs which a successful suitor is entitled to have on taxation allowed. There have been no authorities cited to me in support of any such interference as that, and I certainly am not going to be the first Judge in this Court to set such a precedent.

The demurrer therefore must be allowed, with costs, including the costs of the motion.

Solicitors for the Plaintiff: Messrs. *Jones & Boddington.*
Solicitors for the Defendants: Messrs. *Ashurst, Morris, & Co.*

V.-C. J.
1870
June 29, 30.

COOTE *v.* LOWNDES.

Administration—Locke King's Act (17 & 18 *Vict. c.* 113)—"*Contrary Intention.*"

Where a testator, by a will dated in 1857, after giving a general direction that his debts should be paid as soon as could be after his decease, devised in strict settlement real estates which were subject to mortgages; directed the trustees, during minorities, to receive the rents and profits of the estates, and thereout, amongst other things, to keep down the interest of any sums which might be charged by way of mortgage, or otherwise, on the premises; gave power of sale and exchange over part of the mortgaged estates only; and bequeathed his residuary personalty to his next of kin:—

Held, that no contrary intention had been sufficiently signified to exclude the operation of *Locke King's* Act.

Observations on a *dictum* in *Pembrooke* v. *Friend* (1).

FURTHER CONSIDERATION.

Amongst the questions in this suit was, whether *Locke King's* Act (17 & 18 Vict. c. 113) applied under the following circumstances:—

Eyre Coote, the testator, who died on the 23rd of August, 1864, was immediately before his death seised in fee simple in possession of real hereditaments in *England* and in the *Queen's County*, *Ireland*. He was also possessed of a life estate, with power of mortgage, in freehold hereditaments, called the "*Fingal* estate," county *Dublin*, which had been the subject of his marriage settlement. He was also entitled in reversion in fee simple, expectant on the death of *Barbara* Lady *Milltown*, to other freehold hereditaments in several counties in *Ireland*.

The testator, by his will, dated the 18th of June, 1857, in the first place, directed that all his just debts and funeral and testamentary expenses should be paid and satisfied as soon as could be after his decease. He then gave and devised all the messuages, lands, and hereditaments in *Ireland* to which he was entitled in reversion on the death of *Barbara* Lady *Milltown*, to the use and intent that his wife should receive and take an annuity or yearly rent-charge of £500, to be yearly issuing and payable out of and

(1) 1 J. & H. 132.

chargeable upon all and singular the said hereditaments and premises. He then devised his mansion-house, called *West Park*, and all his freehold hereditaments and real estates whatsoever, as well in *England* as in *Ireland*, whether in possession, reversion, remainder, and expectancy (but subject as to his reversionary estate to the said annuity or rent-charge of £500, and subject as regarded the estates comprised in his marriage settlement to the uses and estates thereby limited and created), to trustees and their heirs to the use of his eldest son and his assigns for life without impeachment of waste, and after his decease to the use of his first and other sons in tail male, with remainders over, in strict settlement. It was provided that if any person for the time being entitled in possession to the rents and profits as tenant for life or tenant in tail should be under twenty-one, the trustees should enter into, and during such minority should continue in, possession or receipt of the rents, issues, and profits, and manage the same, with power to fell timber; and should by and out of the rents and profits, after deducting the expenses of management, repairs, and insurance, and other outgoings, "and keeping down any annual sum or sums of money which may be charged upon the same hereditaments and premises, or any part or parcel thereof, and the interest of any principal sum or sums of money which may be charged by way of mortgage, or otherwise, upon the same premises, or any part or parts thereof," apply any sums they should think proper in the maintenance and education of such minor; and invest the surplus, and accumulate the income, and pay such accumulated fund, provided it did not exceed £20,000, to such person, on attaining twenty-one, as personal estate; and to stand possessed of any surplus over £20,000 upon trust to apply the same in like manner as the moneys to arise from any sale. The will also contained, as to the Irish estates only, usual powers of sale, and reinvestment in freehold hereditaments, and of exchange.

The testator devised and bequeathed his copyholds and leaseholds on lives or for years upon corresponding trusts, charged certain annuities upon his estate of *Damerham*, in *Wiltshire*, and bequeathed his personal estate to his trustees, as to certain chattels and assets specifically; and as to the residue, to the persons who would be entitled thereto under the Statute of Distributions.

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The bill was filed in 1865 to carry the trusts of the will into execution, and prayed, amongst other things, for a declaration whether the mortgage debts charged upon part of the testator's real estates, or any, and what parts thereof, were or were not primarily payable out of the personal estate of the testator.

By the certificate, dated the 23rd of March, 1870, it appeared that the incumbrances affecting the real estates were as follows:— 1. A mortgage for £5221 18*s.* 7*d.* of estates at *Fordingbridge, Hants,* effected on the 27th of July, 1846, by the guardians of the testator, then an infant, the estates having been purchased, with the sanction of the Court, on behalf of the testator, then a minor. This mortgage had been transferred on the 25th of August, 1851. 2. A jointure rent-charge of £1000 per annum on the *Fingal* estate, county *Dublin,* in favour of the testator's widow, effected by him on the 12th of February, 1857, on the occasion of his marriage. 3. A charge on the same estate of £10,000 for portions for younger children of the same date. 4. A mortgage for £14,320 and interest on the *Bowlesbury* farm, *Damerham, Wilts,* effected by the testator on the 11th of August, 1860. 5. A mortgage for £20,000 and interest on five farms in *Hampshire,* dated the 12th of January, 1863. 6. A second mortgage on one of the same five farms, nominally, for £3700, but really to secure payment of two annuities of £50, made by the testator on the 13th of January, 1863. 7. A second mortgage for £10,000 on the *Damerham* estate, made by the testator on the 13th of May, 1863.

Mr. *Bristowe,* Q.C., and Mr. *Cracknall,* for the Plaintiff, the eldest son of the testator:—

The first mortgage was made to raise money to buy an estate which was afterwards put into settlement.

The VICE-CHANCELLOR:—That was not the testator's debt.

Mr. *Bristowe*:—As to the rest: the "contrary intention" which excludes the operation of Mr. *Locke King's* Act is to be found in the following circumstances: There is a direction to pay debts as soon as might be, but no power to sell the real estates, except the power of sale and exchange over the Irish estates; so that the mortgage debts could not be paid immediately, otherwise than out of the

personalty; the real estate is to be enjoyed in entirety and in strict settlement. The income is to be accumulated during minorities; and by the gift of residuary personalty there is no intention shewn to benefit any particular person.

It must be admitted there are no express words indicative of the intention, but express statement of intention is no longer held to be necessary, as Lord *Campbell*, C., seems to have thought in *Woolstencroft* v. *Woolstencroft* (1).

In *Pembrooke* v. *Friend* (2), where there was a direction that debts should be paid as soon as might be after the testator's decease, followed by a devise in fee of a house to his wife absolutely, the Lord Chancellor (then Vice-Chancellor *Wood*) in deciding against evidence of contrary intention, observes: "There would have been more room for argument if the property had been devised in strict settlement; but the gift to the widow being in fee, there was nothing to prevent a sale for payment of the mortgage debt immediately after the testator's decease." Here the precise case arises, and a contrary intention must be assumed.

The VICE-CHANCELLOR observed that in that case there did not appear to have been any power of sale. His Honour also referred to *Eno* v. *Tatam* (3).

Mr. *Willcock*, Q.C., and Mr. *C. Hall*, for the Defendants, the next of kin under the statute, were not heard.

Mr. *Eddis*, Q.C., and Mr. *Faber*, for the trustees.

SIR W. M. JAMES, V.C.:—

In my opinion this case is quite clear.

The "contrary intention" that is required by Mr. *Locke King's* Act must be "signified;" it is not merely to be guessed at by the Court.

Here, the testator by his will directed that all his just debts should be paid and satisfied as soon as could be after his decease. If the case had stood there, it could not have been seriously con-

(1) 2 D. F. & J. 347.
(2) 1 J. & H. 132, 134.
(3) 4 Giff. 181; on app. 32 L. J. (Ch.) 159; 9 Jur. (N. S.) 225; 1 N. R. 529.

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tended that this direction amounted to a declaration that the mortgage debts were to be paid out of the personal estate.

But then followed a limitation of the real estate in a course of strict settlement; and an *obiter dictum* of the present Lord Chancellor, when Vice-Chancellor *Wood*, in *Pembrooke* v. *Friend* (1) was referred to, which only shews how dangerous it would be to draw so broad a conclusion as has been attempted from such narrow premises as the *dictum* in question. In this case the testator has excluded any such conclusion being drawn from his disposition, because he has expressly said that the trustees are, during minorities, to receive the rents and profits, and by and out of the same are to keep down any annuity which may be charged on the premises, "and the interest of any sum which may be charged by way of mortgage" on the same premises.

This gentleman was an Irish as well as an English proprietor; and he evidently contemplated that the mortgage debts would go on being a charge on his Irish estates, from generation to generation.

I can see no indication whatever of any intention to take this property out of the operation of Mr. *Locke King's* Act.

Mr. *Hall* observed that the decision in *Pembrooke* v. *Friend* was made upon a will which came into operation on the 19th of June, 1856. Since that date, namely, on the 13th of August, 1859, had been passed Lord *St. Leonards'* Act (22 & 23 Vict. c. 35), by secs. 14 and 16 of which, where by any will coming into operation after the passing of the Act, the testator has charged any real estate with the payment of debts, without a power of sale, a power of sale is vested in the trustees or executors.

Solicitor for the Plaintiff: Mr. *P. A. Hanrott.*

Solicitors for the Defendants: Messrs. *Church & Clarke;* Messrs. *Woodrooffe & Plaskitt.*

(1) 1 J. & H. 132, 134.

In re SANKEY BROOK COAL COMPANY. (No. 2.)

V.-C. J.
1870
June 4.

Company—Call—Borrowing Powers—Mortgage of future Calls.

Under a power to "pledge, mortgage, or charge the works, hereditaments, plant, property, and effects of the company," in order to secure the repayment of moneys borrowed, the proceeds of a call already made, but not yet paid, may be charged, but not the proceeds of a future call.

THIS was an adjourned summons on behalf of the *Alliance Bank*, that the liquidators of the *Sankey Brook Coal Company, Limited*, might be ordered forthwith to pay to the bank, out of the call made by them on the 2nd of November as such liquidators, the amount due to the applicants in respect of the sum of £10,000 advanced by them to the company, and which the company agreed to pay to them out of such call.

A previous application by the bank, under the winding-up of the company, arising out of the same transaction, will be found reported in *In re Sankey Brook Coal Company* (1).

It will be sufficient now to state, that in the early part of August, 1869, the company were indebted to the bank in a sum of £10,000, on certain acceptances of the company which had been discounted by the bank, and which the directors of the bank declined to renew. A letter was written by a director of the company to the chairman of the bank on the 2nd of August, 1869, proposing the following arrangement (as the company were unable immediately to meet the claim):—That the bank should draw a bill at two months from the 6th of August for £5000, and another at four months for the balance (£5000) of the debt, with interest, due at maturity—these to be accepted with the seal of the company. To provide for these acceptances, the company proposed to make a call of 5*s.* per share at their annual meeting on the 9th of August, which would yield more than the first acceptance of £5000, and the assets would be at the bank in the usual way. Should the company not succeed in selling the colliery, they would make another call of 5*s.*, and so meet the second draft at maturity.

The proposal was accepted by the bank upon the understanding

(1) Law Rep. 9 Eq. 721.

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that a resolution would be passed at the meeting to be held on the 9th of August, calling up 5*s.* per share of the company's uncalled-up capital—the proceeds of such call to be deposited with the *Alliance Bank* to await the maturity of the notes. Pursuant to this arrangement, the bank retired the acceptances of the company for £10,000 falling due during August, 1869. A call of 5*s.* per share was made by the directors of the company, and £2752 8*s.* 10*d.* was paid into the bank.

On the 17th of September, 1869, a resolution was passed to wind the company up voluntarily, and liquidators were appointed. In December an order was made by the Court to continue the winding-up under supervision. The balance of the call of the 9th of August, 1869, received by the liquidators since the 17th of September, 1869, and amounting to £3713 11*s.* 2*d.*, had been paid by the liquidators to the bank under an order made by the Vice-Chancellor on the 15th of February, 1870 (1).

On the 2nd of November, 1869, a second call of 5*s.* per share was made by the liquidators, and on their refusal to pay to the bank any portion of the money received in respect of this call, this summons was, in May last, taken out on behalf of the bank, for an order upon the liquidators to pay to the bank the amount due to them in respect of the £10,000 advanced by them to the company, and which the company had agreed to pay to the bank out of the call.

Mr. *Kay*, Q.C., and Mr. *W. F. Robinson*, in support of the application, contended that the case was concluded by the former decision. The bank was dealing with a trading company which had power to borrow, and, as a security for the repayment of moneys borrowed, to "pledge, mortgage, or charge the works, hereditaments, plant, property, and effects of the company" (2). And under

(1) Law Rep. 9 Eq. 721.

(2) Articles of Association, Clause 29, provided that "the directors may from time to time, under a resolution of the company made in ordinary general meeting (at which meeting there should be present, in person or by proxy, two-thirds in number and value at the least of the shareholders of the company) borrow, and after repayment of any money so borrowed, reborrow, on mortgage, or debenture, or bond, any sum or sums of money, not exceeding in the whole £20,000, and at such rate of interest as to the directors should seem reasonable; and in order to secure the repayment of the moneys so to be borrowed, and the

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this power the company were authorized to mortgage the proceeds of a call: *In re Humber Ironworks Company* (1), especially where, as here, money was borrowed for the strict purpose of carrying on the business of the company, and preventing a forced sale. This call of November, 1869, was part of the arrangement with the bank, and stands on precisely the same footing as that of the 9th of August, to which the bank has been held entitled. No doubt the bank could not have compelled the directors to make the call; but as soon as the call has been made, and the proceeds are in the hands of the liquidators as part of the outstanding property of the company, the equity of the antecedent contract attaches in favour of the bank, and the proceeds are subject to their charge: *Holroyd* v. *Marshall* (2); *In re Panama, New Zealand, and Australian Royal Mail Company* (3); *In re Strand Music Hall Company* (4).

Mr. *Fry*, Q.C., and Mr. *G. B. Finch*, for the liquidators:—

The call now sought to be attached was not made until November, 1869, whereas the former application was decided in favour of the bank on the ground that the money sought to be attached represented the proceeds of a call already made, as distinguished from a future and prospective call. Future calls, which are to be made whenever it "shall appear to the directors to be necessary or expedient," cannot be mortgaged under a provision authorizing the directors to borrow on the security of the funds or property of the company: *Ex parte Stanley* (5); *King* v. *Marshall* (6).

[They were stopped.]

Mr. *Kay*, in reply.

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interest thereof, and any lawful or usual costs, charges, and expenses, the directors may pledge, mortgage, or charge the works, hereditaments, plant, property, and effects of the company; and in any such mortgage there may be inserted, should the directors think fit, a power of sale, and all other usual powers, provisoes, agreements, and declarations; and every such mortgage, debenture, and bond shall be under the common seal of the company, and countersigned by two directors and the secretary."

(1) 16 W. R. 474, 667.
(2) 10 H. L. C. 191, 211.
(3) Law Rep. 5 Ch. 318.
(4) 3 D. J. & S. 147.
(5) 33 L. J. (Ch.) 535.
(6) 33 Beav. 565.

V.-C. J. 1870 *In re* SANKEY BROOK COAL COMPANY. (No. 2.)

SIR W. M. JAMES, V.C.:—

No distinction can, I think, be taken between this and *Ex parte Stanley* (1). In *Ex parte Stanley* there was a power to mortgage, which was substantially the same as the power in this case, only here the words are "property and effects." If anything, I should think the addition of the word "effects" is rather against the applicants, because you use the word "property" in some sense which does not include everything, and then use the word "effects." Nobody using the word "effects" as a word of enumeration would use it except to enumerate some things. I do do not think that the use of the additional word "effects" can in any way enlarge the power, and therefore, having regard to *Ex parte Stanley*—in which, under a power to charge property, which is a thing actually existing, a charge of this nature was held invalid—I hold that the equitable charge in this case was beyond the power of the directors. I may uphold my former decision by saying that I do conceive a call actually made to come under the term "property and effects." It is something actually made; and, for that reason, I suppose I used the expression that the transaction was not completed until after the call was made. The application will be refused with costs.

Solicitors: Messrs. *Flux, Argles, & Rawlins*, agents for Messrs. *Bateson, Robinson, & Morris, Liverpool*; Messrs. *Sharpe, Parkers, & Pritchard*, agents for Mr. *Peace, Wigan.*

V.-C. J. 1870 *April* 30; *May* 6; *June* 11.

In re TELEGRAPH CONSTRUCTION COMPANY.

Company—Superfluous Capital—Distribution amongst Shareholders—Reduction of Capital and Shares—Lease—Claim of Lessor in respect of future Rent—Companies Act, 1862, *s.* 158—*Companies Act*, 1867, *s.* 14.

When a limited company reduces its capital a lessor is entitled to have a sum impounded to answer future rent.

Part 4 L. J. 5 C.L.D. 251. 6 C.L.D. 746.

ADJOURNED SUMMONS.

The *Telegraph Construction and Maintenance Company* were originally constituted with a capital of £750,000, in 37,500 shares of £20 each. Of these only 37,350 shares were actually issued,

(1) 33 L. J. (Ch.) 535.

and these having been fully paid up, the present capital of the company was £747,000, in 37,350 shares.

The company were now desirous of paying back to their shareholders £8 a share, or £298,800; thus leaving themselves with a capital of £448,200, in fully paid-up shares of £12 each.

With this object they had passed a resolution for the reduction of their capital and shares, and a petition had been presented for an order confirming the reduction. Notice of this petition had been sent to the company's lessors as creditors of the company.

It appeared that, under a lease dated the 23rd of June, 1866, the company were lessees of land and buildings, as to the bulk of the premises, for a term of eighty years from Michaelmas 1864, and as to the remainder for a term of seventy-four years from Michaelmas 1870—at a rent of £750 during the first six years of the former term, and of £960 during the residue of the term. The lease was granted in consideration of a premium of £6000, of which £1000 was paid upon the execution. The remaining £5000, with £5 per cent. interest, was afterwards commuted to a yearly payment of £400 during the first twenty years of the term. The lease was also determinable by the company at the end of the first or any succeeding ten years of the former term.

The company had entered the lessors as creditors for £227, the apportioned part of the entire rent (£1150) which had accrued due since the last rent-day, and was not yet payable.

The lessors, on the other hand (who were trustees), valued their claim to this extent, that they were willing to consent to an appropriation of funds equal in amount to the balance of the part-paid premium (£4136 12*s.* 2*d.*), and three years' rent (£2880), making together £7016 12*s.* 2*d.*

Mr. *Macnaghten*, for the lessors:—

The questions are two: 1. Whether we have any *locus standi* at all?—2. Whether the Court will, under the circumstances, dispense with our consent; and if so, upon what terms?

As to the first point, sect. 13 of the *Companies Act*, 1867 (30 & 31 Vict. c. 131), enacts that when a company proposes to reduce its capital, "every creditor of the company who, at the date fixed by the Court, is entitled to any debt or claim which, if that

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date were the commencement of the winding up of the company, would be admissible in proof against the company," shall be entitled to object. Then, have we "a debt or claim" which, under a winding-up, would be "admissible in proof" against the company? I say we have, on the authority of *In re Haytor Granite Company* (1), reversing a decision of the Master of the Rolls in the same matter (2). It should be stated, however, that some doubt is thrown upon the question by the decision in *Horsey's Claim* (3).

It must be admitted, that if the lessors have not a claim "admissible to proof" within the 158th section of the original Act of 1862 (25 & 26 Vict. c. 89), they have no remedy. But it would seem impossible to hold, in the case, for instance, of a large hotel company with assets unimpaired, that they could get rid of the whole obligation of their lease by a winding-up, or by assigning it to a pauper. Suppose the company were to neglect the obligation to keep insured, in the event of a fire they would still have to go on paying rent; and for that the shareholders would be liable. How, then, can it be said, that by reducing their capital *inter se*, the shareholders have got rid of their obligations? They have no power to reconstitute themselves. A company may be in a condition to be wound up without being insolvent.

Assuming that we have a *locus standi*, the next question is as to the terms on which the Court will dispense with our consent. The lessors, being trustees, think it reasonable, in the first place, that the balance of the premium should be paid into Court; and then that three years' rent should be impounded, their surveyor having advised them that in three years' time it may be expected that the property will let again.

The 14th section is express, that, if the company do not admit the full amount of the claim, the Court may "inquire into and adjudicate upon the validity" of the claim and "the amount;" and the amount fixed by the Court "shall be set apart and appropriated."

Mr. *Wickens*, for the company:—

The authorities by no means shew that the lessors have any

(1) Law Rep. 1 Ch. 77. (2) Law Rep. 1 Eq. 11.
(3) Law Rep. 5 Eq. 561.

locus standi. In order to bring the lessors within the 14th section, it is essential that they should be "creditors." It is impossible to say that in every case where a claim can be entered against a company, the person entering such a claim is a creditor. The claim is not a debt, and may never become a debt. All that was said in argument in *In re Haytor Granite Company* (1) may be repeated here.

As to the amount which can be claimed, the balance of the premium is clearly no longer claimable, inasmuch as it has been commuted for a rent.

Again, the nature of the proceeding will be considered. The company is merely getting rid of its superfluous capital; the value of the lessor's security is not substantially, although it may be nominally, diminished. A creditor must not object capriciously. To the £8 proposed to be repaid, creditors, if and when they become creditors, will be entitled to have recourse.

The words "claim" and "proof" have often been used without due discrimination, but it is submitted that they mean two different things; and, following *Horsey's Claim* (2), the Court will in this case, looking at the merits rather than the technical form, dispense with the consent of the lessors altogether.

SIR W. M. JAMES, V.C.:—

In this case it seems to me I must deal with this company exactly in the same way as if, instead of reducing their capital and shares, they were simply dividing a sum of money, amounting to £8 a share, amongst themselves.

In such a state of things the first question would be, "Do all the creditors agree to the proposal?"

But, then, the company say that this so-called creditor has no *locus standi* to object, because he has not got a claim which is admissible to proof under the 158th section of what is called the principal Act of 1862.

I think we must give a liberal construction to the statute, such as is consistent with common justice and common sense; and it appears to me it would not be consistent with common justice or

(1) Law Rep. 1 Ch. 78, 79. (2) Law Rep. 5 Eq. 561.

V.-C. J. 1870 *In re* TELEGRAPH CONSTRUCTION COMPANY.

common sense that a person who has entered into a contingent obligation, by which he has bound himself, should be permitted to say that, because the contingency has not yet happened, although it may still happen, he is not bound to give any security in respect of it.

Here the shareholders were liable to the extent of a sum of £5000, when a bargain was made with the creditor that the debt should be commuted to a rent. Then the shareholders ask to be permitted to do that which will reduce their liability to the extent of £8 a share. I have no doubt that a man in the situation of this lessor has a right to be consulted before the liability of the shareholders is permitted to be restricted. The shareholders—that is to say, the debtor—says, "I am ready to pay everything that is due to you up to this moment." Thereupon the creditor, on the authority of *In re Haytor Granite Company* (1), says, "But I am going to take in my claim;" and then comes the authority of *Horsey's Claim* (2), which says, "You may enter the claim for the whole estimated value of the future rent, but we will not allow you to stop the distribution of the assets among the creditors."

In both these cases we all know that, as far as creditors are concerned, their rights take precedence; but if it comes to a question of distribution of assets, the Court has said it will not allow a claim in respect of a contingent debt to stop the distribution of assets amongst actual creditors.

Now, here I am dealing with the same sort of case as that of a distribution of assets, but amongst shareholders, instead of amongst creditors. These lessors have a contingent claim, they may become creditors; and I think that shareholders (I am not speaking of ordinary creditors) are not entitled to have assets distributed amongst themselves so as to prejudice the claims of contingent creditors. If a creditor has a claim which is admissible as a contingent claim, that ought to be admitted to the catalogue of claims admissible to proof in the winding-up. Such a proof is not a proof for anything payable *in præsenti*, but it is admissible as a proof for something which may ripen into a right to present payment.

These lessors have a claim which is admissible to proof for a

(1) Law Rep. 1 Ch. 77. (2) Law Rep. 5 Eq. 561.

sum which may become payable at some future day, and they are entitled to ask the Court to stop a distribution of the assets amongst shareholders until their claim is secured.

I am of opinion that the lessors are entitled to have a sum impounded to answer this contingent debt.

[After some discussion, the sum which the company, as lessees, were required to pay into Court, was fixed at £7016 12*s.*, being the balance of the premium remaining unpaid, together with three years' rent. This sum was to be invested and retained till the 29th of September, 1884, with liberty to either party to apply; the company to pay the costs.]

May 6. The matter was mentioned again to-day.

Mr. *Macnaghten* said that, instead of the above arrangement, the company were prepared to pay to the lessors, and the lessors were prepared, subject to the approval of the Court, to withdraw their opposition, on being paid, the unpaid balance of the premium.

Mr. *Wickens*, for the company.

SIR W. M. JAMES, V.C.:—

I quite approve of that arrangement.

June 11. The Petition coming on to-day, unopposed:—

The VICE-CHANCELLOR made the usual order; and fixed a fortnight from that day as the period after which the words "and reduced" might be discontinued.

Solicitors for the Lessors: Messrs. *Uptons, Johnson, & Co.*

Solicitors for the Company: Messrs. *Bircham, Dalrymple, Drake, & Co.*

V.-C. J.
1870
May 27;
June 25.

In re FORTUNE COPPER MINING COMPANY.

Company—Winding-up—Petitioners abroad—Affidavit verifying Petition—Place of Business—Service of Petition.

Where a winding-up Petition was presented under a power of attorney executed by Petitioners resident in a colony to a solicitor in this country, it being impossible to comply with Rule 4 of the Order of November, 1862, the Court made the order upon verification of the Petition by an affidavit of the solicitor, deposing of his own knowledge to the facts stated in the Petition.

Where the registered place of business of a company had been demolished, service on directors at the present place of business, though not registered, was held sufficient.

THIS was a Petition for winding up the *Fortune Copper Mining Company of Western Australia*, presented under a power of attorney, executed by the three Petitioners, who were resident in *Western Australia*, to solicitors in this country.

The 4th rule of the General Order of November, 1862, regulating the mode of proceeding under the *Companies Act*, 1862, provides that every winding-up Petition shall be verified by an affidavit, in the form or to the effect set out in the schedule; such affidavit to be made by one of the Petitioners, if more than one; and such affidavit "shall be sworn after and filed within four days after the Petition is presented."

Mr. *Locock Webb*, for the Petitioner, asked the Court to dispense with the statutory affidavit in this instance, inasmuch as it was impossible to file it within the time required.

By the 73rd of the same rules, "the power of the Court to enlarge or abridge the time for doing any act, or taking any proceeding to adjourn or review any proceeding, and to give any direction as to the course of proceeding, is unaffected by these rules."

The VICE-CHANCELLOR thought the proper course would be to apply to the Lord Chancellor.

Mr. *Webb*, on the 6th of June, applied to Lord *Hatherley* and

Followed in Re London & West Derby Building Soc. W.N. (71) 24 1 C. W.

Lord Justice *Giffard,* and referred to *In re Anglo-Danish Steam Navigation Company* (1); and to *In re London and Westminster Co-operative Store Company* (2). Their Lordships said that if an affidavit were filed within a week by some person, deposing from his own knowledge, and not merely to his belief, as to the facts stated in the Petition, such affidavit might, under the special circumstances, be admitted as sufficient.

June 25. Mr. *Webb* this day asked for the winding-up order.

He read an affidavit which had been filed by the solicitor stating that he had had an interview with the secretary of the company, who told him that the company had for twelve months past ceased to carry on business; that they were deeply involved in debt; that money was required to meet claims, but that the company had no money and no means, having expended their capital, and having attempted to raise further capital and failed.

It was further deposed that the company's registered place of business had been demolished in the course of some alterations; that its business was now being carried on at an office at No. 2, *Broad Street,* which had not been registered; and that the secretary and two directors had been served, under Rule 3, with a copy of the Petition at No. 2, *Broad Street.*

The VICE-CHANCELLOR considered the evidence sufficient, and held the service to be sufficient, and made the order.

Solicitor: Mr. *S. J. Daw.*

(1) 15 W. R. 105; 15 L. T. (N.S.) 407. (2) 17 L. T. (N.S.) 559.

V.-C. J.
1870
June 27, 28.

BETTS *v.* GALLAIS.

Patent—Expiration—Equitable Relief—Damages.

The Court will not entertain a bill for the mere purpose of giving relief in damages for the infringement of a patent when the bill has been filed so immediately before the expiration of the patent as to render it impossible to have obtained an interlocutory injunction.

THIS was a bill praying an injunction to restrain the infringement of the Plaintiff's patent for the "invention of a new manufacture of capsules, and of a material to be employed therein;" an account; and compensation in damages.

The patent, which was obtained in January, 1849, was prolonged for a period of five years from the expiration of the original letters patent, and the extended term expired on the 12th of January, 1868.

The present bill was filed on the 8th of January, 1868 (four days only before the expiration of the patent.)

No application had been made for an *ex parte* or interim injunction.

The validity of the patent was admitted by the answer.

Mr. *Willcock*, Q.C., and Mr. *Everitt*, for the Plaintiff, cited *Davenport* v. *Rylands* (1) as shewing that, where there was a right to an injunction to restrain the infringement of the patent at the time of filing the bill, the Court would not, at the hearing, refuse the Plaintiff an inquiry as to damages, notwithstanding the expiration of the patent pending the litigation. In this case, as there, the Plaintiff had a clear *locus standi* at the date of filing the bill, and was thereupon entitled to relief in damages, although the right to an injunction had expired.

Mr. *Kay*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Langley*, for the Defendant, were not called upon.

SIR W. M. JAMES, V.C.:—

I am of opinion that this bill cannot be sustained. I entirely agree with every word which fell from the Lord Chancellor in

(1) Law Rep. 1 Eq. 302.

V.-C. J. 1870 BETTS v. GALLAIS.

Davenport v. *Rylands* (1). But I think he never intended to give countenance to such an application as this, where the patent expired within a few days after the bill was filed, and the Plaintiff must have known that it was utterly impossible he could have obtained any equitable relief before the patent expired. At the time of filing this bill there was a mere claim for damages. In *Price's Patent Candle Company* v. *Bauwen's Patent Candle Company* (2), which was cited in *Davenport* v. *Rylands*, there was an actual *locus standi;* but this is a mere device to transfer a plain jurisdiction to award damages from the Court to which that jurisdiction properly belongs, to this Court.

That being so, the bill must be dismissed with costs.

Solicitors: Mr. *F. Kent;* Messrs. *Flux, Argles, & Rawlins.*

RISHTON *v.* GRISSELL.

V.-C. J. 1870 *April* 22, 25.

Manager—Salary measured by Percentage of Profits—Arrears of Salary—Interest.

Defendant, an owner of ironworks, engaged the Plaintiff as his manager, and verbally agreed to pay him 7½ per cent. of the profits, to be made up to £500 in any year in which the profits should be less than that sum. For several years Defendant paid the Plaintiff at the rate of £500, but it turned out that in some of the years the percentage of profits exceeded £500; and a sum consisting of the total of these overbalances had been found due from the Defendant to the Plaintiff:—

Held, that, in the absence of fraud, the Plaintiff was not entitled to interest on each overbalance as from the year in which it was ascertained, but only to interest from the time of demand.

Pearse v. *Green* (3) distinguished.

FURTHER CONSIDERATION.

In June, 1858, *Henry Grissell*, the owner of ironworks near *London*, called the *Regent's Canal Ironworks*, agreed to employ the Plaintiff, *John Edward Makon Rishton*, as his manager, and verbally agreed to give him an allowance of 7½ per cent. of the

(1) Law Rep. 1 Eq. 302. (2) 4 K. & J. 727.
(3) 1 Jac. & W. 135.

V.-C. J. 1870 RISHTON v. GRISSELL.

profits of the business, to be made up to £500 in any year in which such share of profits should be less than that sum.

From 1858 to June, 1864, *Rishton* regularly drew a salary of £500 a year.

In July, 1864, *Grissell* sold the ironworks to a company, and on the 13th of September, 1864, he handed to *Grissell* a cheque for £554, in discharge of the amounts by which, in some of the above years, according to *Grissell's* estimate, the 7½ percentage on the profits had exceeded £500 a year.

Rishton, being dissatisfied with this estimate, made counter demands, which were not acceded to, and in April, 1865, filed a bill against *Grissell* for specific performance of the agreement, and an account, and payment; and a decree, directing accounts and inquiries, was made on the 19th of July, 1867.

Prior to the taking of the accounts in Chambers, several questions were submitted to the decision of the Court; and the Lord Chancellor (then Vice-Chancellor *Wood*), in giving judgment on the 18th of February, 1868, expressly held (amongst other things) that the position of the Defendant was not that of a partner, but simply one of a foreman, with a salary, the amount of which was to be £500, or an amount to be measured by the percentage of 7½ per cent. on the profits, if, and when, such percentage exceeded £500. See the report (1).

The Chief Clerk, by his certificate dated the 3rd of March, 1870, found that the 7½ percentage on profits exceeded £500 in two years only—namely, 1859 and 1861; and that there was due to the Plaintiff on the 31st of December, 1859, a sum of £440 2*s.*, in respect of that year's excess, and on the 31st of December, 1861, a sum of £405 17*s.* 6*d.*, in respect of that year's excess, making together £845 19*s.* 6*d.*, from which, £554 being deducted, there remained a balance due to the Plaintiff of £291 19*s.* 6*d.*

He also certified that the Plaintiff further claimed interest at 5 per cent. on £440 2*s.*, from the 31st of December, 1859, to the 30th of June, 1864, £99; interest at the like rate on £405 17*s.* 6*d.*, from the 31st of December, 1861, to the 30th of June, 1864, £50 14*s.* 7*d.*; interest at the like rate on £845 19*s.* 6*d.*, from the 30th of June, 1864, to the 13th of September, 1864, £8 13*s.* 10*d.*;

(1) Law Rep. 5 Eq. 326.

and interest at the like rate on £291 19*s.* 6*d.*, from the 13th of September, 1864, to the 31st of December, 1869, £77 7*s.* 2*d.*;—total, £235 15*s.* 7*d.*

The only question of any importance discussed on the further consideration, was as to this claim to interest.

Mr. *Willcock*, Q.C., and Mr. *Hemming*, for the Plaintiff:—

If the Plaintiff had been, strictly speaking, a partner, the authorities would be against his claim. But he was not a partner. He allowed these moneys, though due to him, to remain in the hands of the Defendant, his employer, where they continued to make interest. The Defendant is consequently chargeable, by analogy to the position of a man who, though not strictly a trustee, retains in his hands moneys for which he is bound to account.

The nearest case to the present is *Pearse* v. *Green* (1), which is almost on all-fours.

Under the 28th section of the 3 & 4 Will. 4, c. 42, interest may be allowed by a jury, and always is allowed, from demand; and we made demand, at any rate, in September, 1864.

We had no right to interfere with the accountant of the Defendant. It was for him to furnish the figures shewing what the profits were; consequently the Defendant is liable to the same extent as an agent or a trustee who has falsified accounts: *Earl of Hardwicke* v. *Vernon* (2).

As to the rate of interest, the Defendant is chargeable according to the ordinary commercial rate.

Mr. *Kay*, Q.C., and Mr. *Kekewich*, for the Defendant:—

No case of fraud is made against the Defendant, and that class of authorities does not apply.

The Plaintiff, if not a partner, had it in his own power to increase the profits, and hence, to increase the amount of his own remuneration; and under those circumstances it would be inequitable to give interest against us.

It cannot be contended that the Defendant was constituted a trustee of these funds.

As to the statute, no certain time was fixed for payment, though

(1) 1 Jac. & W. 135, 142, 144. (2) 14 Ves. 504, 510.

V.-C. J. 1870 RISHTON v. GRISSELL.

it may have been stipulated that the account was to be made out at the end of each year; the agreement was a verbal one, and not within the Act.

At any rate, the Plaintiff made no demand which can have reference to anything before the balance (whatever it was) which was due to him in September, 1864. He has made no demand in writing which can entitle him to interest on sums by which he was underpaid during the interval from 1858 to June, 1864, from the time when the balances were ascertained.

In *Pearse* v. *Green* (1), Sir *Thomas Plumer*, M.R., referred to a former case of *Good* v. *Blewitt*, and observed with regard to it, "The officers and crew there were equally partners as here, being entitled to one-third of the proceeds of the prizes."

The VICE-CHANCELLOR:—These shipping cases appear to have been actual partnerships, where there was a fund to be divided which was the common property of all. In this case the Plaintiff and Defendant were not partners, and there is no such common fund. If it were otherwise, moneys which were borrowed would have been borrowed for the purposes of the firm.

Mr. *Willcock*, in reply.

SIR W. M. JAMES, V.C.:—

As the matter now stands, having been fully explained, it seems to me plain that this claim for interest on these balances cannot be maintained.

The Plaintiff has clearly established a debt against the Defendant for arrears of salary or wages due to him, the amount of which was to be ascertained in a particular manner, no doubt; that is to say, by taking a percentage of the profits appearing by books which were to be kept by the Defendant.

If there had been anything like a fraudulent withholding of these books, or anything like a falsification of the accounts, the Court would not have been slow to take the necessary steps to prevent the Defendant from deriving any benefit from that fraud. But it is admitted that here there was no fraud or improper con-

(1) 1 Jac. & W. 142.

cealment, and that the Defendant kept the books much as the Plaintiff might have kept them for himself. The Defendant, however, did, in fact, keep the books, and, upon the footing of the account so kept, the Plaintiff was paid down to September, 1864. But it turned out, according to the view of the Lord Chancellor, sitting as Vice-Chancellor, that an inaccuracy had taken place. His Lordship held, in the first place, that the Plaintiff had a right to restate the different items, and to strike out interest upon the borrowed part of the capital by means of which profits were made. That is a clear decision of the Court, with which it is not competent for me to interfere. It cannot be said that there was anything fraudulent or unreasonable in the Defendant's taking a different view.

It is quite clear that the Plaintiff's claim is not justified by the case of the steward in *Earl of Hardwicke* v. *Vernon* (1), because there the Plaintiff was allowed to surcharge and falsify, and it turned out in the result that the steward had been falsifying the accounts.

Therefore the claim for interest from September, 1864, can be supported no further than if the account had been first struck at that date, and the claim had been then made.

MINUTES.—Let the Defendant, on or before the 9th of May, pay to the Plaintiff the sum of £291 19*s.* 6*d.*, the balance found due to him by the certificate, with £81 3*s.* 3*d.* for interest on the same, at 5 per cent. (less income-tax) from the 13th of September, 1864, to the 9th of May, 1870, and let the Defendant pay the Plaintiff the costs of the suit.

Solicitor for the Plaintiff: Mr. *H. Skynner.*

Solicitors for the Defendant: Messrs. *Bircham, Dalrymple, Drake, Bircham, & Burt.*

(1) 15 Ves. 504, 510.

V.-C. J.
1870
June 24.

METROPOLITAN BANK *v.* OFFORD.

Practice—Plea—Parties—Deed of Assignment—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192–200—*Lease.*

A depositor, by way of mortgage, of a lease, made a registered assignment, under the *Bankruptcy Act*, 1861, of all his estate and effects to trustees, in favour of his creditors. The trustees had not done any act to signify their acceptance of the lease.

The mortgagee filed a bill for foreclosure or sale against the mortgagor, not making the trustees parties.

Plea of the assignment allowed, with leave to amend.

Plea.

The bill was filed on the 7th of February, 1870, by the *Metropolitan Bank, Limited*, against *Robert Marshall Offord, William John Sennett*, and *Hebron Haizelden*, alleging that *Haizelden*, being the owner of a lease of houses at *Lewisham, Kent*, on the 15th of December, 1868, deposited the same with the Defendant *Sennett*, by way of mortgage, to secure the repayment of moneys to the amount of £1000; that *Sennett* shortly afterwards delivered over the same to *John Offord*, who, becoming thereupon solely entitled to the security, on the 21st of December, 1868, deposited the same with the Plaintiffs as a security for a loan of £400; that *John Offord* died on the 16th of June, 1869, intestate, and administration of his estate and effects was granted to the Defendant *Robert Marshall Offord;* that *John Offord*, at his death, was indebted to the Plaintiffs in a sum of £327 18*s.* 11*d.*, or thereabouts; and prayed for an account of what was due to the Plaintiffs upon the security of the deposit of the 21st of December, 1868; for an account of what was due to the Defendant *Sennett*, or the Defendant *Offord*, upon the security of the deposit of the 15th of December, 1868; for payment by the Defendant *Haizelden* to the Plaintiffs of what should be so found due to them; or that the Defendants *Haizelden, Offord*, and *Sennett*, might be foreclosed, and the Defendant *Haizelden* ordered to assign the lease to the Plaintiffs; or for a sale.

On the 16th of May, 1870, the Defendant *Haizelden* filed a plea to all the relief and all the discovery sought by the bill; and by

the plea said that by a deed dated the 4th of March, 1869, the Defendant *Haizelden* assigned all his estate and effects to the Defendant *Sennett*, and *Henry James Baggs*, to be applied and administered in like manner as if the Defendant had been at the date duly adjudged a bankrupt; that the deed was duly executed, assented to, and registered, and became as from the 4th of March, 1869, and had ever since continued, and then was, a valid and binding deed under the Bankruptcy Acts; and that, at and before the filing of the bill, all interest and liability of the Defendant in or in respect of the matters in question in the cause ceased and determined in the same manner as if the Defendant had been previously duly adjudged, and had then continued a bankrupt.

On the 17th of May, 1870, the Defendant *Sennett* put in an answer, by which he disclaimed all right and interest in the matters in question.

From an affidavit of the managing clerk of the Plaintiffs' solicitors, it appeared that on the 3rd of June, 1870, he wrote to *Sennett's* solicitors, asking them to inform him whether the trustees had accepted the lease; in answer to which he was informed that *Sennett* had disclaimed all interest in the matter. He also said he had endeavoured to communicate with *Baggs*, but had been unable to discover his address or residence.

Mr. *Bradford*, for the plea:—

The decision of Lord *Romilly* in *Jones* v. *Binns* (1) is conclusive as to the validity of this plea.

Generally speaking, the trustees of a deed to whom everything has been assigned must be considered to have actively accepted the trust. The case of bankruptcy is not so strong, because an assignee does not actively accept.

Assuming the deed to have the same operation as a bankruptcy, the mortgagor is clearly not a necessary or proper party.

The VICE-CHANCELLOR observed that, in *Jones* v. *Binns*, the Master of the Rolls gave leave to amend by making the assignees parties.

Mr. *Bradford*:—His Lordship did not say the mortgagor was a necessary party.

(1) 10 Jur. (N.S.) 119.

V.-C. J. 1870

METROPOLITAN BANK v. OFFORD.

In *Story's* Equity Pleadings (1) the following passage occurs:— "Another exception has sometimes been made upon a ground not entirely satisfactory, and which may now be considered as of very doubtful authority. It is the case of a bankrupt, in which it is admitted, that though he ought not generally to be made a party to a bill against his assignees touching his estate, yet that, if in such a bill any discovery of his acts, before he became a bankrupt, is sought, he may properly be joined and compelled to make the discovery;" *Whitworth* v. *Davis* (2) also applies. Even if the discovery sought is only incidental to the relief, a bankrupt is not a necessary party: *Gilbert* v. *Lewis* (3). No discovery is sought here.

Mr. *Cozens-Hardy*, for the bill:—

Until the assignees have elected to take the lease, the bankrupt is not discharged from liability; the 145th section of the Bankruptcy Act, 1849, applies to deeds registered under sect. 197 of the Act of 1861: *Porter* v. *Kirkus* (4).

Unless and until assignees do some act to manifest their acceptance of an assignment, a term of years does not vest in them under a general assignment of a bankrupt's personal estate under a commission: *Copeland* v. *Stephens* (5).

SIR W. M. JAMES, V.C., after referring to the decision of the Master of the Rolls in *Jones* v. *Binns* (6), continued:—

I do not think I can overrule this plea; but I will give you leave to amend by making the assignees parties, or shewing a reason why they should not be made parties.

The plea will be allowed without costs.

Mr. *Bradford* observed that in this case the deed had been registered long before the filing of the bill.

The VICE-CHANCELLOR declined to vary the order as to costs.

Solicitors for the Plaintiffs: Messrs. *Lawrence, Hardwick, & Co.*
Solicitor for the Defendant: Mr. *H. M. Rowell.*

(1) Chap. iv. sect. 233, p. 165.
(2) 1 V. & B. 545.
(3) 9 Jur. (N.S.) 187.
(4) Law Rep. 2 C. P. 590.
(5) 1 B. & A. 593.
(6) 10 Jur. (N.S.) 119.

WILLIAMS *v.* LLANELLY RAILWAY AND DOCK COMPANY.

V.-C. J.
1870
June 15.

Practice—Death of one of three Co-Plaintiffs—Form of Supplemental Order—15 & 16 Vict. c. 86, s. 52.

After bill filed by a tenant for life of one third and the owners in fee of two thirds of real estate, against a company for specific performance, and after answers, amendment of bill, notice of motion for decree, and cause set down for hearing, the first mentioned Plaintiff died, and the share of which she had been tenant for life passed to *A.* as tenant in tail in possession:

Order made that the Plaintiffs should be at liberty to prosecute the decree, and have the same benefit of the proceedings against the Defendants, the company, and also against *A.*, as tenant in tail, as they would have had if *A.* had been originally a Defendant.

THIS bill was filed by *Jane Williams, John Howell Gibbs,* and *John Howell Williams* (who was described as of *Gwilaisfawr,* in the parish of *Llandilo Talybont,* in the county of *Glamorgan*), against the *Llanelly Railway and Dock Company,* seeking the specific performance of two agreements.

The bill was answered on the 2nd of November, 1866, and amended on the 6th of August, 1868. As amended, it stated that the Plaintiff, *Jane Williams,* was tenant for life of one undivided third of certain real estate which had been taken by the company under the *Lands Clauses Act,* and that each of the other two Plaintiffs was seised in fee of one other undivided third of the same property.

On the 14th of November, 1869, notice was served of motion for decree, and the cause had been set down for hearing, when, on the 20th of March, 1870, the Plaintiff, *Jane Williams,* died, and the suit thus became defective.

The share of which *Jane Williams* was tenant for life became upon her death vested in another *John Howell Williams* of *Llandilo Talybont* (not the Plaintiff), as tenant in tail in possession.

Mr. *Freeling* mentioned the point.

The VICE-CHANCELLOR made a special supplemental order, of which the following are minutes:—

Upon motion this day made by counsel for the Plaintiffs, *John Howell Gibbs* and *John Howell Williams,* who alleged that the Plaintiff, *Jane Williams,* by

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virtue of the provisions of the 7th section of the *Lands Clauses Act*, 1845, as tenant for life of an undivided third of the hereditaments in the bill mentioned, and the Plaintiffs, *John Howell Gibbs* and *John Howell Williams*, each of them as tenant in fee of another undivided third of the same hereditaments, filed their bill against the Defendants for specific performance; the answer; service of the notice of motion; that the cause had been set down for hearing; the death of the Plaintiff, *Jane Williams*, and the abatement of the suit: "that upon the death of the late Plaintiff, *Jane Williams*, *John Howell Williams* of *Llandilo Talybont*, in the county of *Glamorgan*, under and by virtue of" the settlement in the bill mentioned, "became entitled as tenant in tail in possession to the undivided third of the said hereditaments, of which the late Plaintiff, *Jane Williams*, had been tenant for life; it was therefore prayed that this suit, which, by the death of the late Plaintiff *Jane Williams*, became defective by reason of there not being any person, party to this suit, entitled to the said one third of the said hereditaments, might be prosecuted against the said *John Howell Williams*":—

Order: "That the Plaintiffs, *John Howell Gibbs* and *John Howell Williams*, be at liberty to prosecute the said decree against the Defendants, the *Llanelly Railway and Dock Company*, and have the same benefit of the proceedings against the Defendants, the *Llanelly Railway and Dock Company*, and also against the said *John Howell Williams*, as tenant in tail of the said undivided third of the hereditaments of which the late Plaintiff, *Jane Williams*, was tenant for life, as they would have had if the said *John Howell Williams* had been originally a party Defendant to this cause."

Solicitors: Messrs. *Bridges, Sawtell, Heywood, & Ram.*

V.-C. J.
1870
June 23.

In re ROBERTS.

Practice—Declaration of Title Act, 1862 (25 & 26 *Vict. c.* 67), *ss.* 8, 9, 11.

A certificate of the Petitioner's title having been made by the Chief Clerk upon Petition under the *Declaration of Title Act*, 1862, the Court, pursuant to ss. 8, 9, and 11 of the Act, ordered the declaration establishing the Petitioner's title to be made at the end of three months; security to be given by the Petitioner, to the amount of £40, for payment of the costs of any person who might successfully oppose the declaration of title; and notice of the order to be given by advertising it three times, at three days' interval, in each of three *London* newspapers.

ON the 12th of February, 1870, a Petition was presented under the *Declaration of Title Act* by *Thomas Roberts*, an infant, praying a declaration that, under the provisions of the Act, the Petitioner was entitled to one moiety of a house in *Windmill Street* for an absolute estate in fee simple in possession, free from incum-

brances, subject only to a lease to one *Proger*. A reference to Chambers had been made as to the Petitioner's title, and the Chief Clerk had certified that the Petitioner was entitled to an estate in fee simple in possession, subject only to the lease.

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Mr. *W. H. Terrell* moved, on behalf of the Petitioner, that the certificate might be confirmed, and asked for the direction of the Court as to (1) the time at which the declaration establishing the Petitioner's title should be made (see *Declaration of Title Act*, s. 8), (2) the amount of security to be given under s. 9, and (3) the notice of the order to be given under s. 11.

The VICE-CHANCELLOR ordered the declaration establishing the Petitioner's title to be made at the end of three months; security to be given by the Petitioner, to the amount of £40, for payment of the costs of any person who might successfully oppose the Petitioner's right to the declaration asked for; and notice of the order to be given by advertising it three times, at three days' interval, in each of three *London* newspapers.

Solicitor: Mr. *C. P. Pritchard.*

(c) Se W.R. (1870) 49 L.C.J.

In re EUROPEAN LIFE ASSURANCE SOCIETY.

V.-C. J. 1870 *June* 29.

Company—Winding-up Petition—Petitioner in Arrear of Payment of Calls.

A Petition for winding up a company, presented by a shareholder who, at the date of such presentation, is in arrear of payment of calls due from him to the company, will on that ground be dismissed.

18 L.T. 40

THIS was a Petition by *Robert Crow*, a holder of 306 shares in the *European Life Assurance Society*, for an order to wind up the company.

Mr. *Kay*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Higgins*, for the Petitioner.

In the course of the opening,

The VICE-CHANCELLOR asked whether a single claim against the company had remained unpaid?

Followed in Re Kleanza Steam Co. 19 Eq. 416 (C.B.)

V.-C. J. 1870 *In re* European Life Assurance Society.

Mr. *Fry*, Q.C., and Mr. *Millar*, for the company, who opposed, said that some claims were disputed, but that not one undisputed claim was unpaid.

Mr. *Jessel*, Q.C., and Mr. *C. M. Roupell*, for policy-holders and shareholders, opposed.

Mr. *Kay* proceeded to analyse the last balance-sheet of the company, issued on the 31st of December, 1869 (for the balance-sheet of the year preceding, see a former report (1),) and observed that an item appeared on the credit side of the account in respect of calls that had been made and not paid up. He said that no attempt had been made to enforce payment of these call-moneys, and a large portion of them were utterly irrecoverable.

The Vice-Chancellor:—Has the Petitioner himself paid the calls due on his own shares?

Mr. *Kay*:—He has not, and for this reason: he has sold his shares and attempted to get free from the society, but the directors will not let him off.

The Vice-Chancellor:—I will not hear the Petition until the Petitioner has paid the calls that are due from him.

Mr. *Fry* said he hoped the Court would not allow the Petition to be kept hanging over the heads of the company.

Sir W. M. James, V.C.:—

This Petition is presented by a man who has not performed his own duty to the society.

It being admitted that the Petitioner is in arrear of payment of calls due from him, I dismiss this Petition with costs, the policy-holders and shareholders to have one set each.

Solicitors for the Petitioner: Messrs. *Mercer & Mercer.*
Solicitors for the Respondents: Messrs. *G. L. P. Eyre & Co.*

(1) Law Rep. 9 Eq. 122, 124.

EVERITT *v.* EVERITT.

V.-C. J.

1870

June 30;
July 1.

Voluntary Settlement by young Lady only just of Age—Improvidence—Deed set aside—Form of Voluntary Settlement for the Benefit of the Settlor, a young unmarried Lady.

By a settlement executed by an unmarried lady a few months after she attained twenty-one, it was declared that a sum of money to which she was entitled absolutely should be held by the trustees (who were her stepfather and uncle), upon trust, to invest the same in certain specified classes of securities, and vary the same at the trustees' discretion, and pay the income to the settlor for life, for her separate use, with restraint on anticipation if and when married, and, after her death, to hold the fund in trust for the settlor's children, as she should by will appoint; in default of appointment, for the children absolutely; and in default of children as the settlor should by will appoint, and in default for her next of kin. The trustees were empowered, at the settlor's request, to raise £700 out of the fund, and pay the same to her for her separate use. Power of appointing new trustees was reserved to the surviving or continuing trustees, or to the executors or administrators of the last surviving trustee. The deed was prepared under the advice of a solicitor, who was the solicitor and friend of the stepfather, and known to the Plaintiff. Upon bill, nine years afterwards, by the settlor (who had remained unmarried), to have the settlement set aside:—

Held, that the deed was void, and must be set aside, on the ground of improvidence, and having regard to the age of the settlor; but, owing to the absence of all improper motive, the trustees were allowed their costs, charges, and expenses properly incurred.

Observations on the proper form of a settlement executed under the above circumstances.

THE Plaintiff, *Mary Everitt*, was an unmarried lady, whose father died in 1845, leaving her and a son, his only children. Her mother, in 1850, married the Defendant, *Andrew Edgar*, barrister-at-law, and died in 1858, leaving one child only of her second marriage—a son.

Upon the death of Mrs. *Edgar*, the Plaintiff became entitled in possession to a moiety of a sum of £5000 stock, and by an order of the Court, dated the 8th of February, 1859, on the application of the Defendant *Edgar*, as next friend, Mr. *Edgar* and the Defendant *Isaac Everitt* (an uncle of the Plaintiff) were appointed guardians of the Plaintiff and her brother during their minorities.

On the 18th of May, 1860, the Plaintiff attained twenty-one, and on the 20th of June following a sum of £2315 18*s.* 10*d.* stock—

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which represented her moiety in the above sum of £5000 stock, after certain deductions for costs, and for advances for education and maintenance—was, by an order of the Court, transferred into her name. On the 7th and 8th of June two sums of stock, amounting together to £1420 0*s.* 2*d.*, to which the Plaintiff was entitled under her grandfather's will, were also transferred into her name.

The Plaintiff deposed to the effect that, some weeks before she attained twenty-one, Mr. *Edward Futvoye*, solicitor (of the firm of *Futvoye, Sawtell, & Lightfoot*), an old and intimate friend of Mr. *Edgar*, who had acted as his solicitor in the matters of the guardianship, and was well known to herself, suggested and proposed to her that, upon attaining twenty-one, she should make a settlement, for the benefit of herself and her children (if she should have any), of the bulk of her property. "The said Mr. *Futvoye* represented that such a settlement was one which I, as a matter of prudence, ought not to omit making; and that it would be a provision for me and my children if I married, although I did not then contemplate any marriage in particular; and would be an answer to the importunities of persons seeking to obtain money from me by way of gift or loan; and that, if it were made, no further settlement would be required in case of my marriage." Plaintiff was strongly urged by Mr. *Edgar* to accede to this suggestion, and she did eventually, and before she attained twenty-one, accede to it.

Mr. *Futvoye's* account was very similar. He said that, after having frequently talked with the Plaintiff and Mr. *Edgar* on the subject, about three weeks before the Plaintiff attained twenty-one, he had an interview with her, at which, after stating and suggesting as above, he explained to her that a settlement such as he proposed would protect her and her children, if she married, and might be an answer to the importunities of persons seeking to obtain money from her by way of gift or loan, "about which she had complained to me;" and that, if it were made, no further settlement would be required in the case of her marriage.

Accordingly, a draft settlement was prepared. Mr. *Futvoye* said he (as he believed), on the 30th of April, laid it before the Plaintiff and her aunt, and explained it to them; and he (as he believed), on the 3rd of May, left a copy with the Plaintiff.

The Plaintiff said that, for some weeks before she attained

twenty-one, she was living at a boarding-house at *Bayswater*. To the best of her recollection and belief, the draft was not read by her, nor read over to her. She had no independent professional advice, and was not duly informed as to the purport and effect of the deed.

By the settlement, which was executed by the Plaintiff on the 12th of July, 1860, and purported to be made between the Plaintiff of the one part and the Defendants of the other part, after reciting that the Plaintiff had, on or before the execution, paid £3200 into the hands of the Defendants, it was declared that the Defendants, their executors, administrators, and assigns, should and would stand possessed of the same, upon trust to invest in certain specified classes of securities in the names of the trustees for the time being, and "from time to time, at the discretion of (*sic*) the proper authority of the trustees or trustee," to vary securities, and stand possessed of the same, upon trust to pay the income to the Plaintiff and her assigns for life; but so that, if she should at any time be under coverture, the same should be paid as she should by writing, but not by way of anticipation, appoint, and in default, to her separate use; and, after her decease, should stand possessed of the fund, upon trust for the children of the Plaintiff as she should, whether covert or sole, by will appoint; in default, for all Plaintiff's children by any husband equally; and if there should be no child of the Plaintiff who should attain a vested interest, for such trusts and purposes as the Plaintiff should, notwithstanding coverture, by will appoint; and, in default, for such persons as should, at the Plaintiff's death, be entitled to her personal estate, according to the Statute of Distributions. It was declared that it should "be lawful to and for" the trustees, "at the request of" the Plaintiff, "testified by some writing under her hand," to raise a sum not exceeding £700 out of the fund, and pay the same to the Plaintiff, "for her sole and separate use." The power of appointing new trustees was reserved to the surviving or continuing trustees or trustee, or, if there were none such, for the retiring trustees, or, if all should be dead, for the executors or administrators of the last surviving trustee, "or for some or one of such person or persons, if the other or others of them shall be unable or unwilling" to exercise the power.

The facts as to the £3200 were, that the sum of £2315 18*s.* 10*d.*

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stock was sold out on the 23rd of June, and produced £2150 18*s.* 6*d.*, and the sum of £1402 0*s.* 2*d.* £3 per Cent. Stock was sold out on the 14th of July, 1860, and produced £1320 9*s.* 8*d.* Both sums were received by Mr. *Futvoye*; and out of the total of £3471 8*s.* 2*d.* £3200 was, on the 14th of July, 1860, advanced to a Mr. *Huggins*, on the security of a mortgage, dated the day before, of certain freehold property at *Finchley*. In January, 1866, the mortgage was paid off, and the £3200 was advanced to a Mr. *Oxtoby*, on the security of a mortgage, dated the 20th of January, 1866, of some property at *Mitcham, Surrey*, at £4 per cent. interest, for a term of five years certain.

Plaintiff called upon the trustees to raise and advance her the £700, and was told that the money could not be called in until the 20th of January, 1871. She complained of irregularity in the payment of her interest, but that was in some measure accounted for by her changes of residence. Finally, she called on the trustees to transfer the mortgage debt and securities to her, which they refused to do without the sanction of the Court. The Plaintiff's last letters were dated from a convent in *France*.

It was stated that since the settlement she had become entitled to other property.

The bill was filed on the 15th of September, 1869, answered on the 27th of November, and amended on the 1st of March, 1870.

The bill alleged that the Plaintiff was not informed that under the deed she would part with all control over investments, and the appointment of new trustees; that although there was nothing to prevent her whilst unmarried from disposing of the whole of her life estate, she had no power of disposing of the capital (beyond £700, and that only with the trustees' consent), except by will; and that from the omission of any power enabling her to make provision for a husband, the probability of her contracting an eligible marriage was much lessened; that the execution of the deed was a hasty and improvident act, and that the investment on the mortgage for a term of years was a breach of trust.

The bill prayed for a declaration that the settlement was not binding on the Plaintiff, and that the same might be set aside; that the Defendants might be ordered to transfer to her the £3200; and other alternative and consequential relief.

The Defendants, by their answer, said that the terms of the settlement were fully discussed and explained to the Plaintiff before she executed it. They submitted that the settlement was neither a hasty nor an improvident act on the part of the Plaintiff, and that it was not the fact that it was not in any way to her benefit or advantage; but they submitted to act as the Court should direct.

Mr. *Fry*, Q.C., and Mr. *T. Stevens*, for the Plaintiff:—

The improvidence of the instrument appears from this, that it deprives the Plaintiff of a veto on investments and on the appointment of trustees; it does not give her a power of appointment to children by deed; allowing her the opportunity of making away with the whole of her life estate, it yet gives her no control over the capital (beyond £700), except by will; and it gives her no power of conferring a life estate upon a husband. Even the £700 is not to be absolutely under her own control.

Besides, it contains no power of revocation. This alone throws the onus on the donees to shew that the settlor fully intended to make the gift irrevocable: *Coutts* v. *Acworth* (1); *Wollaston* v. *Tribe* (2).

A third ground of relief is that the deed does not carry out the intention expressed by the Plaintiff when a minor. In such a case the Court will not rectify, as shewn by the last-mentioned cases.

The only question is, did the Plaintiff put her property beyond her reach without proper assistance? Fraud, in this instance, is not suggested.

The only evidence of the exercise of any volition on the Plaintiff's part is a statement of something that took place when she was under age. She says she was not informed, and that is not contradicted.

The statement in the deed as to the payment of the £3200 is untrue: *Huguenin* v. *Baseley* (3); *Prideaux* v. *Lonsdale* (4); *Phillipson* v. *Kerry* (5); *Lister* v. *Hodgson* (6); *Jarratt* v. *Aldam* (7).

(1) Law Rep. 8 Eq. 558.
(2) Ibid. 9 Eq. 44.
(3) 14 Ves. 273.
(4) 1 D. J. & S. 433.
(5) 32 Beav. 628.
(6) Law Rep. 4 Eq. 30.
(7) Law Rep. 9 Eq. 463.

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Mr. *Kay*, Q.C., and Mr. *Kingdon*, for the Defendants:—

The Defendants have submitted to act under the direction of the Court. As to the motives of the Plaintiff's advisers there can be no doubt. She was living in a boarding-house, exposed to the wiles of needy adventurers.

[The VICE-CHANCELLOR:—As to the worthiness of the motives I have no doubt.]

Mr. *Kay*:—This was not a settlement for the benefit of any particular donee.

As to the improvidence, she might have raised £700, and given it to an intended husband. If her husband were to survive her, and there were no children, she might make a will in his favour.

To have inserted a power of revocation would have been practically to defeat the object of the settlement. It would have left her without protection. She herself had complained to Mr. *Futvoye* about the importunities of people who wanted to get money from her.

The Plaintiff comes very late, after she has for several years reaped the benefit of this arrangement.

SIR W. M. JAMES, V.C.:—

In this case I do not think the settlement can stand, upon the rules laid down in *Prideaux* v. *Lonsdale* (1), and the other cases cited. It is very difficult indeed for any voluntary settlement, made by a young lady so soon after she attains twenty-one, to stand, if she afterwards changes her mind, and wishes to get rid of the fetter which she has been advised to put upon herself.

The settlement, so far as Mr. *Futvoye* was concerned, and so far as the young lady herself was concerned, was the most honest thing in the world: I have not the slightest doubt of that, and I desire it to be distinctly understood that I so consider it. I can easily conceive, looking at the young lady's position at the time, that it was very desirable indeed she should, if she could, be protected against any imprudent act of her own. I think, possibly, if she had put herself under the control of trustees, the settlement might have stood, if she had reserved a power of revocation, with the consent of the trustees, so as to meet the exigencies of life; and I

(1) 1 D. J. & S. 433.

am satisfied that the sole object of this settlement was, as Mr. *Futvoye* says, to "protect her and her children, if she married," and that it might be "an answer to the importunities of persons seeking to obtain money from her by way of gift or loan, about which she had complained to me, and that, if it were made, no further settlement would be required in case of her marriage." If I were asked to prepare a settlement having that as the sole object, I probably should have said in such a case, "Have proper trustees; give her a voice in the selection of new trustees, if it should occur; and give her a power of revocation with the consent of trustees, so as to put her in a position to meet the exigencies of life." I am not sure that a settlement of that kind could have been sustained, having regard to the authorities, and the fact of its having been made so soon after the young lady attained twenty-one. I think, possibly, it would have been better, also, if Mr. *Futvoye* had said, "You had better talk to some one else. I have been solicitor for the trustees; this is my view; go and get some other solicitor, and consult him about it."

Whether that would have made any practical difference I do not know at the present moment, but I think the settlement imprudent as it is. It deprives her of all control over her own property, and, having regard to the principles on which this Court proceeds, it cannot stand. I have to consider whether I can sustain it on behalf of the future children, if any, and on behalf of the next of kin. I do not think it is possible to do so; but as the trustees seem to have acted really with the desire to benefit her, and with a single-minded intention, and no other motive, they are entitled to have their costs out of the trust fund.

I declare the settlement void, and vest in the Plaintiff the right to the mortgage security. She will pay the costs, charges, and expenses of the trustees, properly incurred, to be taxed if the parties differ. On such payment there will be a transfer to her of the mortgage debt and securities. The lady may be consulted, and if she should prefer to take the mortgage-money at once, that can be done—the money being paid to her, less the costs, charges, and expenses.

Solicitor for the Plaintiff: Mr. *Charles William Stevens.*
Solicitors for the Defendants: Messrs. *Futvoye & Co.*

V.-C. B.
1870
July 9.

In re GARTNESS IRON COMPANY. *Ex parte* LORD ELPHINSTONE.

Company—Feu Charter—Scotch Law—Feu Duties—Claim of Superior in respect of future Feu Duties—Companies Act, 1862, *s.* 158.

5 L.D. 252. 6 L.D. 746

A company, assignees from a former company of a piece of land in *Scotland*, which had been disponed to them by the heritable proprietor on payment of certain feu duties, having been ordered to be wound up:—

Held, that the superior was entitled to enter a proof for the feu duties then due, and also entitled to enter a claim, but not a proof, for the capitalised value of the future feu duties.

Adjourned Summons.

By a feu charter, dated the 10th of December, 1855, Lieutenant-Colonel *James Drummond Buller Elphinstone*, of *Carberry* and *Monkland*, in *Scotland*, the heritable proprietor of the lands thereby disponed, in consideration of "a payment of the sum of £30 sterling yearly in name of feu duty at Whitsunday and Martinmas, by equal portions in all time thereafter, and a further payment of £30 sterling in name of composition at the term of Martinmas, 1880, and the like sum at the term of Martinmas every twenty-fifth year thereafter," sold, alienated, and in feu farm disponed to *William Murray*, *James Murray*, *Alexander Warren Buttery*, and *Francis Murray*, co-partners, carrying on business under the firm of the *Monkland Iron and Steel Company*, and to the survivors and survivor of them, in trust for the company, 3A. 3R. 25P. of land, part of the lands of *Monkland*, in the parish of *New Monkland*, and shire of *Lanark*.

At the death of Colonel *Elphinstone* the land and hereditaments descended to, and were now, the property of Lord *Elphinstone*, subject to the right, title, and interest of the original feuars, as vassals under the feu charter.

In September, 1865, the feu charter was transferred to the *Gartness Iron and Steel Works Company, Limited.*

On the 27th of November, 1865, Lord *Elphinstone* signed a writ of confirmation of the disposition of the land and hereditaments in favour of the last-mentioned company, so far as consistent with the feu charter, and subject to the feu duty and other rights.

The company entered upon and used the land until a winding-up order, dated the 23rd of February, 1867.

The feu duties were regularly paid by the company, and afterwards by the liquidator, down to the term of Whitsunday, 1869, (and since).

The summons was taken out by Lord *Elphinstone*, that the official liquidator be ordered to pay to the applicant "the feu duties now due, and which will hereafter accrue due, from the said company in respect of the lands, by virtue of the feu charter, until the same lands should be reconveyed to him;" also that the applicant might be admitted as a creditor of the company for the sum of £600, "being the present capitalised value of the feu duties payable by the said company under and by virtue of the said feu charter, after deducting the present value of the said land, and assuming that the same land will be forthwith reconveyed to the said Lord *Elphinstone* by the liquidator, or otherwise be legally revested in him."

It was stated, but did not appear in evidence, that a dividend was about to be declared.

There was evidence to shew that the land (which was covered with rubbish, and the buildings upon which had been dismantled, and were uninhabitable) was not in its present state worth more than £15, and not worth 15*s.* a year. A valuator gave £600 as the present value of the capitalised feu duties, and £15 as the value of the duplication in each twenty-fifth year, making together £615. This sum, less the present value, gave £600.

On behalf of Lord *Elphinstone*, an opinion of Lord *Gifford* (then Mr. *A. D. Gifford*, advocate), was referred to, in which this passage occurred: "If there were arrears of feu, he (Lord *Elphinstone*) might make the security for such arrears real upon the materials on the ground, by pounding of the ground; and he may rank as a personal creditor for the value of future feu duties so far as the ground does not afford an adequate security. Therefore, assuming the *Gartness Company* not to have been accepted as vassals, Lord *Elphinstone* will also have a personal claim for the feu duties against the *Monkland Iron and Steel Company*, who were the original feuars."

On the other hand, the company had taken an opinion of

V.-C. B. 1870 *In re* GARTNESS IRON] COMPANY. *Ex parte* LORD ELPHINSTONE.

Mr. *Andrew Rutherford Clark*, Solicitor-General for *Scotland*, which had been embodied in an affidavit. The learned advocate gave evidence as follows:—

"1. By the law of *Scotland* it is in the power of an owner of land, holding such land of a superior under feu charter from or feu contract with him, absolutely to dispose and convey such land without the consent of such superior to such party as he shall see fit, provided said land is so conveyed under burden of the conditions contained in the original charter or contract.

"2. By said law it is imperative on the superior, by statute 20 Geo. 2, c. 50, to receive as his vassal and the party liable to perform the conditions of said feu charter or contract any party to whom lands held of him had been conveyed under burden of said conditions.

"3. By said law the superior ceases to hold the original owner of said land as liable to perform the conditions of said feu charter or feu contract, after he has received the party to whom such lands have been conveyed under burden as aforesaid, unless he shall have a separate personal contract with such original owner, binding him and his representatives to pay and perform the conditions of such charter or contract."

Mr. *Clark* was asked whether he could carry his opinion so far as to say that a superior was bound to admit an assignee who was evidently put forward as a means of relieving a vassal from an onerous contract, and said that such a point, though fairly arguable, had never been determined.

Mr. *Kay*, Q.C., and Mr. *G. N. Colt*, for the Applicant:—

That we are entitled to enter a claim for the £600 will probably not be disputed: *In re Haytor Granite Company* (1); *Horsey's Claim* (2); *In re Telegraph Construction Company* (3). But we also claim to be admitted as creditors of the company for this amount.

As to the obligation, the law is thus laid down by Lord *Cranworth*: "In the case of superior and vassal, the vassal for the time being is personally liable for the feu duties; just as in the case of landlord and tenant, the tenant for the time being is

(1) Law Rep. 1 Ch. 77. (2) Law Rep. 5 Eq. 561.
(3) *Ante*, p. 384.

personally bound to pay the rent": *Royal Bank of Scotland* v. *Gardyne* (1).

Mr. *Fry*, Q.C., and Mr. *Macnaghten*, for the official liquidator :—

We do not dispute Lord *Elphinstone's* right to have a claim entered for the value of the future feu duties; but we dispute his right to be entered as a creditor, and if he be entered as a claimant at all, we then claim the right to dispute the amount of the estimate.

The proprietor here is not quite in the position of a lessor; there is no covenant to pay the feu duties, and the result of the evidence as to the Scotch law appears to be that the vassal may alienate the land to whom he pleases, leaving only the personal liability to pay. The only personal liability here is a liability on the part of the *Monkland Company*, the original feuars of the land. The confirmation by Lord *Elphinstone* did not place the disponee under a personal liability.

Mr. *Kay*, in reply :—

The question is reduced to a very small point.

It is admitted we may enter a claim; and all they say is, we cannot stop any dividend being paid. But there is no distinction in the statute between entering a claim and entering a proof. What is the use of entering a claim, if not to stop payment of a dividend?

The argument about the possibility of an assignment may be dismissed, because in point of fact none has been made.

The value of the property has, confessedly, been reduced to 15*s.* a year by demolition of the buildings, so that we have nothing but our personal remedy left; and Lord Justice *Giffard*, when Vice-Chancellor, in *Horsey's Claim* (2), said the chance of our losing our rent is a matter that cannot form the subject of an estimate.

As to the value of the feu duties, the amount is admitted.

MR. J. BACON, V.C. :—

The question now is simply upon the capitalised value of the feu duties.

(1) 1 Macq. 358, 360. (2) Law Rep. 5 Eq. 566.

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I have not been able to perceive that which has been suggested as being an inconsistency in any of the three cases which have been referred to. They all proceed upon the 158th section of the Act of 1862 as the basis of the proceedings; and that provides, as I conceive in very plain terms, for the preservation of contingent rights when the affairs of the company come to be administered.

In *In re Haytor Granite Company* (1) the claim was admitted for the estimated ascertained value of the lessor's interest. Under the circumstances there existing, there being then no present debt, no shilling of money due to the claimants, the order then made which authorized the establishing of the claim, protected and prevented the claim being treated as an absolute proof; but it contained in it the right to prove whenever, by the default of the assignee of the lease, there should be rent in arrear. If that had happened, then, the claim being entered, the lessor would have a right to come and ask for payment of the rent then due.

Then *Horsey's Claim* (2) does not seem to differ from that in any respect. The first decision was exactly in all respects on all-fours with the *In re Haytor Granite Company*. The second, which was Lord Justice *Giffard's* decision, only dealt with the matter in this way: It said, "You have got a claim which prevents the dissolution of the company until your claim is provided for, for a certain amount. There are assets of the company presently distributable among the creditors of the company. It is the scope of the Act of Parliament, and the duty of the persons employed in the administration of it, to satisfy debts which are presently payable. You have no debt presently payable. Until the amount of your debt has been ascertained, your rights in that respect must not prevent the creditors from receiving their debts, or the company having the means of satisfying its debts from paying these dividends which are declared." I do not see, therefore, what other decision could (if I may say so) have been made on the second occasion on which *Horsey's Claim* came before the Court. It would have been wholly unreasonable to diminish the dividends on the debts payable to other creditors in respect of something which might become a debt, but which was not a debt due to the lessors

(1) Law Rep. 1 Ch. 77. (2) Law Rep. 5 Eq. 561.

at that time. It could not be done. There were no *data* for accurate calculation. Could it be said what amount should be set apart to answer the claim? There was no debt due. There was nothing on which any such calculation could be made; and although, in the words ascribed to Lord Justice *Giffard*, there may be some doubt as to the possibility of estimating the value with reference to the power of distress and so on, I do not think that the substance of the decision creates the slightest difficulty.

The third case which was mentioned (*In re Telegraph Construction Company* (1)) is not open to the same observation, because there the shareholders, the debtors, were coming and asking to diminish the security which their creditors had. That, as a matter of course, could not be allowed, except on the terms of the debtors providing for the contingent debt.

All that can be done, as I conceive, in this case, consistently with the decisions which have been referred to, and in conformity with the true intent and meaning of the Act of Parliament, and the justice of the case as between the parties, is to admit as a claim that sum which is agreed upon as being the estimated value of the contingent right which the claimant has; but there can be no present order for payment, no turning that claim into a proof, for the reasons that I have mentioned; and, if I advert further to what Mr. *Kay* has so strenuously and properly urged, it is because it is an important consideration in the case, that, the value of the land being ascertained to be almost *nil*, Lord *Elphinstone's* only remedy will be against the company itself. A suggestion has been made that the grantee in fee has a right to assign to any one that he thinks fit. If he assigns to a substantial person, that will be all the better as far as the original grantor is concerned. If he assigns to a person in an almshouse, that will be very disadvantageous to the grantor, because he may lose the personal remedy which he now has under the original grant. But by admitting the claim I give him all that he can claim against the company, who take by substitution of the grantees; because if the claim to £600 is now admitted, neither can the dissolution of the company take place, nor anything be done by them in prejudice of that claim, without first satisfying it. So that the threat that they will assign to a beggar is

(1) *Ante*, p. 384.

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In re GARTNESS IRON COMPANY. *Ex parte* LORD ELPHINSTONE.

a perfectly futile threat, as far as the present applicant is concerned, if his claim be admitted. I think he is entitled to have his claim admitted for that amount; and beyond that, I think that, neither according to reason, nor justice, nor in accordance with the Act of Parliament, nor according to the decisions which have been referred to, has he any right whatever.

I think I must take it as a fact proved, that the estimated value of the feu duties is this sum of £600. I do not think any further expense in proving that should be incurred.

The order will be that the applicant be allowed to prove for the arrears of the feu duties (if any) admitted to be due; and to enter a claim for £600, as the estimated value of the future feu duties; and the costs of all parties will come out of the estate, as this was a very fair question to be raised.

Solicitors for the Applicant: Messrs. *Winter, Williams, & Co.*

Solicitors for the Official Liquidator: Messrs. *Uptons, Johnson, Upton, & Budd.*

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1870
June 10, 16.

Bankruptcy Act, 1869, *s.* 95, *sub-s.* 3; *s.* 125, *sub-ss.* 4, 5, 7—*Execution—Seizure and Sale—Liquidation by Arrangement.*

Sect. 95, sub-sect. 3 of the *Bankruptcy Act*, 1869, does not protect an execution against the claim of a trustee under a liquidation, who has been appointed after seizure and before sale, even though the sale has been delayed by an injunction obtained under Rule 260 of the Bankruptcy Orders, 1870.

THIS was an application by an execution creditor for an order that he might be at liberty to proceed with the sale of the goods of his debtor (which sale had been restrained by an order of the Court, dated the 14th of March), and directing that after such sale the bailiff might, after payment of his own charges, pay to the applicant out of the proceeds of the sale the amount due on the judgment, with costs.

The facts were as follows:—Judgment for £28 12*s.* had been recovered by Mr. *Veness* against *Gwynn*, who was a trader. On the 7th of March an execution was levied on the goods of the debtor, and the officer of the Court being in possession was about to sell them, the sale being advertised for the 14th of March. On the 12th of March a Petition for liquidation by arrangement, under the 125th section of the *Bankruptcy Act*, 1869, was filed by the debtor, and notice of this was on the same day served on Mr. *Veness* and on the bailiff. On the 14th of March an order was obtained, on the application of *Gwynn*, for the appointment of a receiver; and an injunction was at the same time granted, restraining any further proceedings under the execution. The execution creditor was served on the 12th with notice that the application would be made, but did not attend. Notice of the injunction having been granted was served upon the solicitor of Mr. *Veness* on the 14th of March. It also appeared that at the time of the execution, a claim to the chattels seized was made by the holder of a bill of sale, who paid the bailiff the fees for retaining possession up to the next sitting of the County Court; the bailiff thereupon took out an interpleader summons on the 14th of March, on which an order

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was made by the County Court, on the 11th of April, in favour of Mr. *Veness*, the execution creditor, on the ground that the bill of sale was a fraudulent assignment on the part of *Gwynn*. On the 9th of May a Mr. *Cuthbert* was appointed trustee.

Mr. *Bagley*, for *Veness*, the execution creditor:—

Edwards v. *Scarsbrook* (1) decides that "notice of any act of bankruptcy" means notice of an act of bankruptcy committed prior to seizure; and notice subsequent to the seizure but prior to the sale does not deprive the execution creditor of his right to the proceeds of the sale. Here there was no act of bankruptcy until after seizure.

Even if the bill of sale was an act of bankruptcy, this is a liquidation by arrangement, and not a bankruptcy; and section 125 of the *Bankruptcy Act*, 1869, sub-sect. 4, is in the following words: "The liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee;" and there is no provision under this section corresponding to sect. 11 of the Act (2), which defines the commencement of bankruptcy, and therefore it is immaterial whether the bill of sale was an act of bankruptcy or not.

Mr. *Miller* (solicitor), for the trustee:—

Sect. 125, sub-sect. 5, enacts that "all such property of the debtor as would, if he were made bankrupt, be divisible among his creditors, shall, from and after the date of the appointment of a trustee, vest in such trustee under a liquidation by arrangement;

(1) 32 L. J. (Q. B.) 45.

(2) Sect. 11 is as follows: "The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him bankrupt; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication; but the bankruptcy shall not relate to any prior act of bankruptcy, unless it be that at the time of committing such prior act the bankrupt was indebted to some creditor or creditors in a sum or sums sufficient to support a Petition in bankruptcy, and unless such debt or debts are still remaining due at the time of the adjudication."

and all such settlements, conveyances, transfers, charges, payments, obligations, and proceedings, as would be void against the trustee in the case of a bankruptcy shall be void against the trustee in the case of a liquidation by arrangement;" and the execution not having been completed by seizure and sale, is not a protected transaction within sect. 95, sub-sect. 3 (1), and the property in the goods remained in the debtor and is now vested in the trustee.

Sub-sect. 7 of sect. 125 assimilates as far as possible proceedings under a liquidation by arrangement with proceedings under a bankruptcy, and by sect. 11 the bankruptcy is defined to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging the debtor bankrupt; and here the bill of sale was an act of bankruptcy anterior even to the seizure.

Mr. *Bagley*, in reply.

June 16. MR. BACON, C.J., after stating the facts, continued:—

The substantial question is, whether the execution creditor is entitled to payment of his debt out of the proceeds of the goods seized, or whether they form a part of the estate of the debtor and are to be administered for the equal benefit of his creditors? The case has been argued at great length; I do not mean at too great length, for, depending as it does upon the recent statute, and involving principles which are applicable to cases which may hereafter arise, and perhaps not unfrequently, it is very desirable that the provisions of the statute should be carefully considered. Many arguments have been urged and several authorities have been referred to, which, however cogent and applicable they may be in other cases, do not, in my opinion, affect the decision which ought to be pronounced in the present.

(1) Sect. 95, sub-sect. 3, is as follows: "Any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not, at the time of the same being executed by seizure and sale, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

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On the part of the trustee it is insisted that, by virtue of his appointment, in him is vested all the property of the debtor divisible among his creditors, that the chattels seized under the execution were the debtor's property (which cannot be disputed), and that the execution not having been completed by seizure and sale before the appointment of the trustee, they still remain the same property. He has argued, also, that the bill of sale has been proved to have been an act of bankruptcy. Evidence has been gone into with the view of shewing that before the seizure the creditor had notice of such act of bankruptcy. Then he says further, that if he should fail in proving such notice (as upon the evidence of the creditor and the two attorneys whose affidavits have been read, I think he has failed), that notice is immaterial, for that the 11th section of the statute carries the title of the trustee by relation to the date of the bill of sale, which was anterior to the seizure. Mr. *Bagley*, for the execution creditor, disputes these propositions. He denies the application of the doctrine of relation to the case of liquidation by arrangement, and disputes the fact of notice prior to the seizure, and relies upon the protection afforded by sub-sect. 3 of the 95th section, which is in nearly the same terms as sect. 133 of the repealed statute of 1849, and which gives protection to executions completed by seizure and sale before the date of the order of adjudication, without notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication; and he supports his argument by reference to *Edwards* v. *Scarsbrook* (1), in which it was decided that the notice mentioned in the statute of 1849 means notice of an act of bankruptcy committed before the seizure; and that, although notice of an act of bankruptcy committed subsequent to the seizure but prior to the sale there existed, such notice did not deprive the execution creditor of his right to the proceeds of the sale.

Now, in this state of contention the only source from which the Court can derive the materials for its decision is the statute itself, keeping in mind the decisions under former statutes (of which *Edwards* v. *Scarsbrook* is one), and the provision in the repealing statute (2) that such repeal shall not affect any principle or

(1) 32 L. J. (Q. B.) 45. (2) 32 & 33 Vict. c. 83, s. 20.

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rule of law derived from any enactment in the former statutes. I have observed, upon a former occasion, that some difficulty may occasionally arise from the fact that the existing Act deals with two separate subjects, and that the effect of the provisions applicable to liquidation by arrangement can only be ascertained by reference to the analogous provisions, which are in their literal terms applicable only to bankruptcy. That this was the intention of the Legislature is, in my judgment, quite apparent; and although I feel that it is not within my province to supply any real deficiency (if any such deficiency should be found), yet it is not less plainly my duty in construing the statute to give a full and fair interpretation of its terms, and not to be diverted from that course of proceeding by any supposed ambiguity, or by any cavil which may be raised by means of a verbal criticism of its provisions. Then, how does this case stand upon the statute? The 7th division of the 125th section prescribes that in liquidation a trustee shall have the same powers as a trustee in bankruptcy, that the property of the debtor shall be distributed in the same manner as in a bankruptcy, that all the provisions of the Act shall apply to the case of liquidation by arrangement in the same manner as if the word "bankrupt" included a debtor whose affairs are under liquidation, and the word "bankruptcy" included liquidation by arrangement, and that the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the presentation of a petition of bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy. Laying aside all considerations appertaining to the law of relation in bankruptcy (on which I do not think it necessary or expedient now to pronounce any opinion), it seems that a trustee having been appointed, and the date of his appointment being the commencement of the liquidation (the period at which the property vests in him) and of the same force and effect as if an order of adjudication in bankruptcy had on that day been made, it cannot be questioned that any execution levied on such property would be ineffectual against the trustee unless it is protected by some provision of the statute. The only protection applicable in this case is to be found in the 3rd division of the 95th section, which renders valid any execution against the goods of a debtor executed in good faith by

6 Ex. 231

6 Ex. 239,

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seizure and sale before the date of the order of adjudication, if there was not at the time of the seizure and sale notice of any act of bankruptcy committed by and available against the debtor for adjudication. Then was the execution of Mr. *Veness* within the terms thus expressed? He had seized before any Petition was presented; what is equivalent to an order for adjudication has taken place, and the goods are not sold at this moment. The consequence appears to me to be inevitable, that the property in the goods seized is vested and remains in the trustee.

Nor does the case of *Edwards* v. *Scarsbrook* (1) extricate the execution creditor from this consequence. It was there held—and I am bound by that decision—that the notice mentioned in the 133rd section of the Act of 1849 meant notice of an act of bankruptcy committed prior to the seizure; but in that case the execution was completed by sale as well as by seizure before adjudication had vested the property of the debtor in the assignee. In *O'Brien* v. *Brodie* (2) the Court decided that the actual sale, although it had been stayed by an order of the Court, not having taken place till after a petition for adjudication, the title of the assignee prevailed over that of the execution creditor. The last-mentioned case was decided with reference to sect. 184 of the Act of 1849, which is not repeated in the existing Act. It is unnecessary to speculate upon the reasons which may have induced the Legislature to omit that provision.

Having regard, however, to the power which the Court now possesses under sect. 13 and Rule 260 of the Bankruptcy Orders, 1870, to restrain all proceedings in any action, suit, execution, or other legal process against the debtor, as well in liquidation as in bankruptcy, and to the fact that the protection in sect. 95 is made to extend to the date of the order of adjudication, and not (as in sect. 133 of the Act of 1849) to that of the filing of the Petition, I am not more inclined to think that the omission was unintentional or accidental than I should be at liberty, even if I thought so, to disregard the plain tenor of the statute. I am therefore of opinion that, the execution levied by Mr. *Veness* not being, for the reasons I have given, within the protection of the 95th section, the property in the goods seized is vested in, and that possession of them must

(1) 32 L. J. (Q. B.) 45.

(2) Law Rep. 1 Ex. 302.

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be delivered to, the trustee, and I order accordingly; and I therefore refuse the application made on behalf of Mr. *Veness*.

With respect to costs, I think that a very needless expense has been incurred by means of the affidavits which have been filed for the purpose of raising questions wholly beside the proper object of the discussion arising upon the motion; although, therefore, I dismiss the application of Mr. *Veness*, I order him to pay only the costs of that application, including those of the affidavits made in the first instance in support of the application, but no others.

Solicitors for the Execution Creditor: Messrs. *Lawrance, Plews, & Co.*, agents for Mr. *Langham, Hastings*.

Solicitors for the Trustee: Messrs. *Miller & Miller*.

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1870
June 2, 16.

Bankruptcy Act, 1869, *ss.* 11, 95, *subs.* 3; *s.* 125, *sub-ss.* 4, 5, 7—*Execution—Seizure and Sale—Liquidation by Arrangement—Relation back.*

In sect. 95, sub-sect. 3 of the *Bankruptcy Act*, 1869, "act of bankruptcy" means an act of bankruptcy which has been committed at the time of seizure.

Therefore, where a Petition for liquidation was presented after the goods of the debtor, a non-trader, were seized in execution, and the sale took place before the appointment of a trustee, and no act of bankruptcy had been committed before the seizure:—

Held, that the execution creditor was entitled to the proceeds.

Semble, the rights of a trustee under a liquidation relate back in the same manner as those of a trustee under a bankruptcy.

THIS was an application by a trustee under a liquidation by arrangement, for an order that two sums of £52 5*s.* and £40 19*s.* 4*d.*, which had been paid to two execution creditors by the Sheriff of *Kent* out of the proceeds of the sale of the bankrupt's property, might be refunded by the execution creditors to the trustee, on the ground that the moneys were part of the debtor's estate, and became vested in the trustee on his appointment.

The facts and dates were as follows:—On the 2nd of February execution was issued against the goods of the debtor, a non-trader, and as a claimant under a bill of sale was alleged to be in posses-

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sion, the sheriff took out two interpleader summonses, and an order was made on the 22nd of February for the sheriff to sell the goods and pay the proceeds into Court. On the 25th of February a Petition was presented by the debtor for liquidation by arrangement under sect. 125. The sheriff sold the goods on the 28th of February and paid the proceeds into Court. On the 14th of March *N. S. Todhunter* was appointed trustee in the liquidation. On the 15th of March the solicitor to the trustee gave notice to the solicitors for the execution creditors that the trustee claimed the fund in Court on the ground that it vested in him on his appointment. On the 2nd of May, the claimant under the bill of sale declining to press his claim, the money was paid out to the execution creditors on a Master's order, the trustee having had no notice that the bill-of-sale holder had given up his claim, or that any application would be made for the payment of the money in Court to the execution creditors.

Mr. *Reed*, for the trustee:—

All the property which the debtor possessed at the time of filing his Petition for liquidation vested in the trustee on his appointment: the filing a petition for liquidation is an act of bankruptcy: *In re Jones*, before your Honour, on the 25th of February last; and by sect. 125, sub-sects. 5 and 7, proceedings under liquidation are assimilated as much as possible to proceedings under bankruptcy, and by sect. 11 of the Act the bankruptcy shall be deemed to have relation back to, and to commence at the time of, the act of bankruptcy being completed on which the order is made adjudging the debtor bankrupt; and such property as may belong to the bankrupt at the commencement of the bankruptcy is by sect. 15, sub-sect. 3, divisible among his creditors, and of course vests in the trustee. The only section in the Act which gives protection to execution creditors is sect. 95, and that section requires that any execution or attachment against the goods of any bankrupt must be executed by seizure and sale before notice of any act of bankruptcy; here the sale did not take place until after the filing of the petition for liquidation, and *O'Brien* v. *Brodie* (1) applies.

(1) Law Rep. 1 Ex. 302.

Mr. *Maurice Powell*, for the first execution creditor:—

The trustee's title under a liquidation by arrangement can only commence with his appointment as trustee. Sect. 125, sub-sect. 4, distinctly enacts that the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee; and there is no provision, as in bankruptcy, that the title of the trustee shall relate back to any act of bankruptcy. If the provisions in bankruptcy apply to proceedings under a liquidation, then this sale comes within the protection afforded by sect. 95, sub-sect. 3; since by sect. 125, sub-sect. 7, the appointment of the trustee is to be deemed equivalent to an order of adjudication in bankruptcy, and in this case the sale was completed before the appointment of the trustee, although after the filing of the Petition. "Notice of an act of bankruptcy" means notice of an act of bankruptcy committed prior to the seizure: *Edwards* v. *Scarsbrook* (1), and here there was no act of bankruptcy till after the seizure.

Mr. *Groom* (solicitor), for the second execution creditor.

Mr. *Reed*, in reply.

June 16. MR. BACON, C.J., after stating the facts and dates, continued:—

The case is of considerable interest and importance, and has been fully argued; and it is because of the importance of the principle which it involves, and the effect of those principles upon other cases, which may not be of unfrequent occurrence, that I thought it right to deliberate for a short time before I decided it. On the part of the trustee, it has been argued that his title dates from the filing of the Petition for liquidation, and that the executions not having been completed by seizure and sale before that time (the 25th of February), it is not within the protection afforded by the 95th section of the Act of 1869, and consequently that the property taken in execution was vested in the trustee for the

(1) 32 L. J. (Q. B.) 45.

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benefit of the creditors; and in support of this contention, reference is made to the 5th and 7th sub-sections of the 125th section of the Act; and the claimant further relies on the 3rd subsection of the 95th section which is to be read as a substitute for the 133rd section of the Bankruptcy Act of 1849. The case of *O'Brien* v. *Brodie* (1) decided that, under the law as it then stood, when an execution was levied by seizure, but the sale was suspended by an interpleader order, and before sale a Petition for adjudication was filed against the execution debtor, on which he was afterwards adjudged bankrupt, the execution creditor was deprived of the benefit of his execution by reason of sect. 184 of the Act of 1849; and it was insisted, on the part of the claimant, that the filing of the Petition by the debtor in this case was equivalent to an adjudication, and that the sale not being at that time completed, although it had been delayed only by the interpleader proceeding, the property seized passed to the trustee in accordance with the last-mentioned decision. On the part of the execution creditor, it was argued that the seizure and sale having been completed before the appointment of a trustee, if that was to be taken as equivalent to an adjudication, the 95th section applied; and that even if the presentation of the Petition were to be taken as the root of the trustee's title, the execution creditors who had notice of that proceeding were not affected by it, their seizure having been made on the 2nd of February, and *Edwards* v. *Scarsbrook* (2) having decided that, in order to bring a case within sect. 184 of the Act of 1849, the notice there referred to must be of an act of bankruptcy committed prior to the seizure; and, upon the construction of the Act of 1869, it was contended that, under the subsects. 4 and 5 of the 125th section, the liquidation could not be taken to have commenced at any earlier time than that of the appointment of the trustee, nor the title of the trustee to the property vested in him to have any earlier origin, and that there could be no relation to any act of bankruptcy earlier, at the most, than the presentation of the Petition. The question which is thus raised can only be determined by the enactments of the statute duly considered and rightly construed.

The statute provides for two different modes of dealing with

(1) Law Rep. 1 Ex. 302. (2) 32 L. J. (Q. B.) 45.

the estates which fall under its operation, and such difficulty as exists appears to arise from the circumstance, that while the provisions relating to bankruptcy proper are expressed in detail, those which relate to liquidation by arrangement are made by reference to those which belong to the former. It was plainly the object of the Legislature to provide a general law which should comprise the whole subject of bankruptcy, and which should be substituted for that which had before existed; and this object seems to have been accomplished by the four first divisions of the statute. In the sixth division, all the property of the debtor vests in a trustee appointed under liquidation, and is divisible among the creditors, and all proceedings which would be void against a trustee in bankruptcy are void against a trustee under a liquidation. Such a trustee has the same powers as a trustee under a bankruptcy, and the property of the debtor is to be distributed in the same manner as in a bankruptcy; and all the provisions of the Act apply to the case of liquidation by arrangement, in the same manner as if the word "bankrupt" included a debtor whose affairs are under liquidation, and the word "bankruptcy" included liquidation by arrangement. With the guide furnished by the provisions I have mentioned, and keeping in view the obvious purpose of the statute, I think there can be no doubt that the questions raised in the present case must be decided in the same manner as they would be if the Petition for liquidation had been a Petition in bankruptcy followed by adjudication. And I may here observe that I wholly dissent from the arguments of the Respondents, that the title of the trustee dates only from his actual appointment. It is true the liquidation is deemed to have commenced as from the date of the trustee's appointment—that means that the active prosecution of the liquidation shall thenceforth ensue; but it is also provided that the appointment of a trustee (and this, as I take it, without any reference to the particular time at which such appointment may have been made) shall be deemed to be equivalent to, and a substitute for, the presentation of a Petition in bankruptcy, or the service of such Petition, or an order of adjudication in bankruptcy. Inasmuch, therefore, as a trustee in bankruptcy, at whatever time he might have been appointed, would be entitled to dispute any proceeding affecting

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the bankrupt's estate, or the interests of the creditors (and an execution by a creditor is such a proceeding), I am of opinion that the trustee in this case is well entitled to call in question that proceeding of the Respondents by which a portion of the debtor's property has been withdrawn from distribution among the general body of creditors.

The question, therefore, to be determined is, whether, if this case were in bankruptcy, and not under liquidation by arrangement, the trustee could sustain the claim he now makes? In considering this question, regard must, of necessity, be had to the law as it existed before the present statute, and it has been truly said in the course of the argument that sect. 133 of the Act of 1849 is substantially the same as sect. 95 of the present Act. The case of *O'Brien* v. *Brodie* (1) can hardly be said to be applicable, because the decision there turned upon the 184th section of the Act of 1849, a provision which is not repeated in the present Act. The similarity in the facts of the case, therefore, does not help the argument, the judgment coming simply to this, that the execution creditor, having been prevented by the order of the Court from selling before adjudication had taken place, was at the time of such adjudication a creditor holding security for his debt, and therefore deprived of the benefit of that security by the express terms of the 184th section. Nor does the case of *Parsons* v. *Lloyd* (2) affect the question, nor is it inconsistent with the other decision; and in neither of these cases did the judgment of the Court turn in any degree upon the 133rd section. But the case of *Edwards* v. *Scarsbrook* (3) appears to me to go direct to the point which is here involved. In that case the execution had been levied by seizure. Subsequently the debtor committed an act of bankruptcy, of which the creditor had notice. Notwithstanding such notice, the sheriff sold, and after that an adjudication was made. In that case it was argued on the part of the assignee that the notice prevented the completion of the execution before the actual sale, and consequently that the protection afforded by sect. 133 did not extend to the creditor. The Court, however, decided that the notice of an act of bankruptcy men-

(1) Law Rep. 1 Ex. 302. (2) Law Rep. 1 Ex. 307, n.
(3) 32 L. J. (Q. B.) 45.

tioned in that section referred only to notice of an act of bankruptcy committed prior to the seizure; and that, the sale having been completed before the adjudication, the 184th section had no application, the creditor not then having any security for his debt. In another case, *Young* v. *Roebuck* (1), not mentioned in the argument, where the seizure was without notice, but the sale was subsequent to the adjudication, it was held in the Court of Exchequer that although the execution was not invalidated by the subsequent notice, yet the execution creditor was within the provision of sect. 184 as being a secured creditor. I conceive that the law, as laid down in the case of *Edwards* v. *Scarsbrook* (2), must govern the present case. At the time of the seizure it is not suggested that the debtor had committed any act of bankruptcy. It is therefore unimportant to consider what might otherwise have been the effect of sect. 11 of the present Act; and assuming that the presentation of the petition for arrangement was equivalent to an act of bankruptcy (being a proceeding upon which, in certain events, an order of adjudication might have been made), the seizure under the execution preceded the petition for liquidation, of which notice was served upon the execution creditors.

There is this difference between the phraseology of sect. 133 of the Act of 1849 and sect. 95, that both clauses having for their object the protection of certain transactions completed without notice, the period of completion is, in the former statute, the filing of the Petition, and in the latter it is the date of the order of adjudication. When, however, it is borne in mind that the existing statute enables the Court, as well in liquidation as in bankruptcy, to protect the debtor's estate for the equal benefit of the creditors against all executions which may have been levied upon the debtor's property, the reason of the difference I have mentioned is apparent. That this wholesome provision has not been resorted to in the present case is, perhaps, to be regretted; but that fact cannot alter the law which it is my duty to pronounce, according to what I conceive to be the true construction of the statute, and which I do, carefully guarding myself against being misled by a consideration of what may be called the hardship of the case upon creditors, and against that error pointed at

(1) 32 L. J. (Ex.) 260.
(2) 32 L. J. (Q. B.) 45.

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by the Chief Baron in *O'Brien* v. *Brodie* (1), which consists in legislating where the only duty of the Court is to interpret the statute.

The case is one of entire novelty, and I have felt it to be not without difficulty. I think it was fairly raised by the trustee in the discharge of his duty; and although I am compelled to make no order upon his motion, I shall dismiss it without costs. It was not wholly illegal for the Respondents to pursue the course they have adopted; but, having regard to the facts appearing upon the affidavits, although I must leave them in possession of the advantage they have gained, I cannot make the other creditors pay the costs of a litigation which might have terminated otherwise if the application made to the Respondents had been answered and met with a greater degree of frankness.

Solicitor for the Trustee: Mr. *Wetherfield.*

Solicitors for the first Execution Creditor: Messrs. *Bannister & Robinson.*

Solicitors for the second Execution Creditor: Messrs. *Powell, Thompson, & Groom.*

C. J. B. 1870 *June* 2, 16.

Ex parte KEY. *In re* SKINNER.

Bankruptcy Act, 1869, *s.* 6, *sub-s.* 5; *ss.* 11, 87, 95, *sub-s.* 3; *s.* 125, *sub-ss.* 4, 5, 7—*Execution—Seizure and Sale—Application of Proceeds—Liquidation by Arrangement—Relation back.*

In sect. 87 of the *Bankruptcy Act*, 1869, "bankruptcy petition" includes a petition for liquidation. Therefore, where the sheriff seized and sold the goods of a trader on a judgment for more than £50, and after the sale a petition for liquidation was presented, of which the sheriff had notice within fourteen days, an order restraining the sheriff from paying the proceeds to the execution creditor, and directing payment to the trustee when appointed, affirmed.

THIS was an appeal from part of an order, dated the 27th of April, 1870, and made by the Registrar of the County Court of *Berkhampstead*, restraining the sheriff of *Herts* from paying over

(1) Law Rep. 1 Ex. 302.

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the proceeds of any sale under an execution issued upon a judgment for £54 19*s.* 4*d.*, and £4 for costs, recovered by *Key* against *Skinner*, who was a trader, and directing the sheriff to hold the same proceeds until the appointment of a trustee under a liquidation, and then pay them to the trustee.

It appeared from the evidence that the execution was levied by seizure on the 8th of April by *Key*, and that the sheriff sold the goods on the 13th. On the 20th of the same month a Petition was filed by the debtor under sect. 125, for liquidation by arrangement, and notice thereof, in accordance with sect. 87, was given to the sheriff on the 22nd of April. On the 27th of the same month the order appealed from was obtained by the attorney for *Skinner*, without due notice thereof having been given to the execution creditor or the sheriff, neither of whom appeared, and the trustee was appointed at a meeting of creditors held on the 7th of May.

Mr. *Bagley*, for the execution creditor:—

The execution was completed by seizure and sale, and the creditor is therefore entitled to the proceeds under sect. 95, sub-sect. 3; and *Edwards* v. *Scarsbrook* (1) is a decision in my favour. The title of a trustee under a liquidation by arrangement dates only from his appointment, and there is no relation back as in proceedings in bankruptcy: sect. 125, sub-sect. 4; and the *Debtors' Act*, 1869, part 2, confines all proceedings against a fraudulent debtor, whose estate has been liquidated by arrangement, to the time of the commencement of the liquidation.

Mr. *Reed*, for the trustee:—

By sect. 125, sub-sects. 5 and 7, it must be held that the title of the trustee has relation back to the act of bankruptcy, and here the act of bankruptcy was the levying an execution by seizure and sale for an amount not less than £50, the debtor being a trader; and by sect. 87 the sheriff is bound to retain the proceeds of a sale of the goods of a trader for fourteen days, and if he has notice that a bankruptcy petition has been presented to pay such proceeds to

(1) 32 L. J. (Q. B.) 45. 12 Jur. N.S. 537

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the trustee, and here the words "a bankruptcy petition" must include a petition for liquidation by arrangement.

Mr. *Bagley*, in reply.

June 16. MR. BACON, C.J., after stating the object of the application and the facts as above set forth, continued:—

On the part of the execution creditor it is argued that the seizure and sale having been complete before the petition for liquidation was filed, the proceeds of the execution were not the property of the debtor, but had become the absolute property of the creditor long before any proceeding towards liquidation had been instituted, and *Edwards* v. *Scarsbrook* (1) was relied on to shew that the title of the trustee dates only from the time of his appointment, and that neither by relation or otherwise can he assert any earlier title.

The trustee insists that his title extends by relation under the 11th section of the statute to the act of bankruptcy, which was committed by the debtor, a trader, by means of the execution levied on his goods for a debt not less than £50, in the terms of the 5th sub-section of sect. 6 of the existing Act; and further, that the trustee's claim and the order appealed from are supported by sect. 87 of the statute, which is similar to, but not quite the same, as sect. 73 in the Act of 1861, and which provides that in the case of the goods of a trader, seized and sold under a judgment for the like amount, the officer shall retain the proceeds of the sale in his hands for fourteen days, and upon notice to him of the presentation of a petition of bankruptcy within that period shall pay the same to the trustee; but if no order of adjudication shall be made, the officer is to deal with the proceeds as if no notice had been served upon him. The trustee also insists that although the 4th sub-section of Clause 125 enacts that the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee, such enactment points only to the distribution of the estate, and the proceedings which may be requisite to effectuate that object, and does not limit the title of trustee by relation; that as by sub-sect. 5 of the same clause, all such pro-

(1) 32 L. J. (Q. B.) 45.

perty of the debtor as would, if he were bankrupt, be divisible among his creditors, vests in the trustee from his appointment, all such property as was recoverable and distributable, as part of the bankrupt's estate, becomes subject to the provisions of the Act; and he enforces this argument by reference to the 7th sub-section of the same clause, by which it is provided that a trustee under a liquidation shall have the same powers as a trustee in bankruptcy, and the property of the debtor shall be distributed in the same manner as in a bankruptcy, and that all the provisions of this Act shall apply to liquidation by arrangement, as if the word "bankrupt" included a debtor under arrangement, and the word "bankruptcy" included liquidation by arrangement.

The question, therefore, in this case is of the same nature as that which has arisen in the preceding cases (1). Whatever difficulty it may present arises from the same cause, and from the necessity the Court is under to construe the provisions of the statute so as to maintain the harmony of those provisions and to give them their full effect—not, however, straining its express terms, or guessing at what may be supposed to have been the intention of the Legislature. Without repeating, but always keeping in mind the distinction between bankruptcy and liquidation, which I have on former occasions pointed out, I find that the 5th sub-section of the 6th clause of the Act provides that when execution for not less than £50 has been levied by seizure and sale of the goods of a trader, such trader has committed an act of bankruptcy. Sect. 87 requires the sheriff—who must of necessity know the fact, and must be assumed to know the law—to retain the goods of a trader sold under execution for a like amount for fourteen days, if he has notice within that period of a bankruptcy petition, and only in the case of no adjudication being made to pay the proceeds to the execution creditor. Then if bankruptcy includes, as the statute says it shall, liquidation by arrangement, it appears to me that I am compelled to read "bankruptcy petition" in the 87th section to mean also a petition for liquidation. The appointment of a trustee under a liquidation is equivalent to an order of adjudication, and at whatever period it may be made, or

(1) *Ex parte Veness, In re Gwynn, ante*, p. 419; *Ex parte Todhunter, In re Norton, ante*, p. 425.

C. J. B. 1870 *Ex parte* KEY. *In re* SKINNER.

whenever the liquidation is to commence, the effect and consequence of it is to clothe such trustee with the powers of a trustee in bankruptcy, and to make the property of the debtor distributable, as it would be in bankruptcy. There can, I conceive, be no question that if the debtor had been adjudicated bankrupt upon a petition presented for that purpose, his assignee or trustee would have been entitled to overreach the execution without reference to the date of his appointment; nor would it have been protected by the 3rd sub-section of sect. 95, although completed by seizure and sale before the adjudication, not only because the seizure and sale constituted in themselves an act of bankruptcy, but because the protection meant to be afforded by the 95th section is in express terms subject to the provisions of the Act relating to the proceeds of the sale and seizure.

In coming to the conclusion I have drawn, I have not omitted to give full consideration to the argument on behalf of the execution creditor, founded upon the second part of the *Debtors' Act*, 1869 (32 & 33 Vict. c. 62), which was resorted to for the purpose of insisting that the employment by the Legislature of the words "commencement of the liquidation" in the one statute must have in the other the effect of confining all proceedings under liquidation to that precise time, as distinguished from proceedings in bankruptcy, which are to date from the presentation of a bankruptcy petition. But I do not think that the true construction of the statute supports the argument, for although in many of the sub-sections in section 11 in the *Debtors' Act*, by which the penalties consequent upon a conviction for a misdemeanour are imposed, the distinction referred to is very clearly expressed, yet it is equally clear that the section, in its generality, applies to both classes of debtors, and that the first three and the last of the sub-sections apply not less to any person whose affairs are liquidated by arrangement than to persons adjudged bankrupt, and this without reference to the period at which the liquidation commences; nor is it difficult, having regard to the several cases provided for, to perceive good reasons for the manifest difference in the provisions in this respect. I feel myself, therefore, compelled to decide that the order appealed from is right in substance, and the appeal must, therefore, be dismissed; but I think that a trustee having now been appointed,

the order should be varied by directing the sheriff to pay the proceeds of the sale to that trustee by name, to be dealt with and distributed by him as part of the debtor's estate in liquidation. Having regard, however, to the fact that no notice was given to the execution creditor of the order which was obtained from the County Court, I dismiss the appeal without costs.

Solicitor for the Appellant: Mr. *Henry Tayler.*
Solicitors for the Respondent: Messrs. *Webb & Webb.*

M. R.
1870
June 15, 28.

BARKER *v.* BARKER.

Will—Legacy on Condition of Conveying Real Estate—Conveyance—Lien for Unpaid Legacy.

A testator gave a legacy to each of his daughters on condition that she should convey her share of certain real estate, to which the daughters were entitled, to the sons of the testator; and in case of any daughter refusing or being unable to comply with the condition, the legacy bequeathed to her was to be forfeited and to form part of the testator's residuary personal estate. The testator gave his residuary personal estate to his sons; and he appointed one of them and two other persons executors. The daughters conveyed their shares of the real estate to their brothers, but did not obtain payment of the legacies:—

Held, that they were not entitled to any lien in the nature of a vendor's lien on the real estate conveyed by them for their legacies.

WILLIAM BARKER, the testator in the cause, had eight children, viz., three sons, *John*, *Ormerod*, and *Peter*, and five daughters. Under the will of their paternal grandfather these children were entitled to certain shares in certain freehold cotton mills, dwelling-houses, and lands in the neighbourhood of *Todmorden*, in *Yorkshire*.

The testator made his will, dated the 28th of June, 1861, and thereby bequeathed to each of his daughters the sum of £1000, payable, with interest at 4½ per cent., in one year from his decease, to such of them as were of full age, and to his youngest daughter (who was then under age) on her attaining twenty-one; and he also directed his trustees to invest the sum of £5000, and to pay the interest of £1000, part thereof, to each of his daughters during their respective lives, as therein mentioned; and after the death of each daughter, to pay such sum of £1000 to her children and issue as therein mentioned. The will then proceeded as follows: "I declare that the legacies bequeathed as aforesaid to and for the benefit of each of my said daughters and her children or other issue are bequeathed on this express condition, that each such daughter shall, at the request and costs of my said sons, their respective heirs or assigns, grant and convey all their share, estate, and interest in the lands, mills, dwelling-houses, buildings, and hereditaments devised by the will

of my late father, and all erections and improvements since made thereon, unto and to the use of all my said sons, their respective heirs, executors, administrators, and assigns, in equal shares as tenants in common. And in case of her refusing or being unable (if and when of full age) to comply with this condition, the legacies so bequeathed to and for the benefit of such daughter shall be absolutely forfeited and form part of my residuary personal estate." The testator devised his real estate and bequeathed his residuary personal estate to his three sons in equal shares; and he appointed his son *John* and two other persons trustees and executors of his will.

The testator died on the 31st of July, 1862.

In June, 1864, the three sons of the testator procured their sisters, and the husbands of such of them as were married, to execute an indenture (dated the 7th of June, 1864), by which the shares of their sisters in the cotton mills, dwelling-houses, and lands devised by the will of their grandfather were conveyed to the three sons of the testator, their heirs and assigns, in equal shares as tenants in common.

No part of the legacies bequeathed to or upon trust for the daughters or their issue was ever paid. The testator's estate had been, to a great extent, lost; and *John Barker*, one of the executors, had died in insolvent circumstances. Under these circumstances the bill in this suit was filed by three of the daughters to enforce payment of their legacies; and the question mainly discussed was, whether they were entitled to any lien on the hereditaments conveyed by the deed of the 7th of June, 1864, for their legacies; these hereditaments not having been alienated by the three sons of the testator.

Mr. *Jessel*, Q.C., and Mr. *J. T. Humphry*, for the Plaintiffs:—

The testator gave legacies to his daughters on condition that they should convey certain real estate to his three sons. If they did not convey, the legacies were to fall into the residue of the testator's personal estate, and thus could pass to the three sons of the testator. The daughters have conveyed, but have not been paid their legacies; and we submit that they are in the position of unpaid vendors, and are entitled to a lien on the lands conveyed

M. R. 1870 BARKER v. BARKER.

by them. The principle on which the Court holds that a vendor, who has not been paid, is entitled to a lien on his land, is that it would be contrary to natural equity to allow a purchaser to retain an estate which he had not paid for: *Chapman* v. *Tanner* (1); *Blackburn* v. *Gregson* (2); *Mackreth* v. *Symmons* (3); *Story's* Equity Jurisprudence (4); and there is a like natural equity in favour of the Plaintiffs. The sons never parted with the hereditaments conveyed to them, so that no question arises with purchasers for value; and their creditors have no specific lien on the property.

Mr. *Phear*, for Defendants in the same interest as the Plaintiffs.

Mr. *Southgate*, Q.C., and Mr. *Babington*, for *Ormerod Barker*:—

There is no lien here. The testator says, "on condition of my daughters conveying certain property to my sons, they shall receive certain legacies from my executors." The daughters chose to convey, and the executors did not pay. Why is *Ormerod Barker*, who is not an executor, to be liable for the default of the executors?

Again, if there be a lien, what is it a lien for? What is the purchase-money? and how much of it is *Ormerod Barker* bound to pay?

Mr. *Jessel*, in reply:—

Although *Ormerod Barker* was not an executor, he was a residuary legatee; and if the daughters had not conveyed, he could have obtained the benefit accruing from the increase of the residuary estate, which would have followed. Can he keep the estate and not pay for it?

June 28. LORD ROMILLY, M.R.:—

The question principally argued is, whether there is any lien upon the shares conveyed by the daughters for their legacies. At

(1) 1 Vern. 267.
(2) 1 Bro. C. C. 420.
(3) 15 Ves. 329.
(4) Vol. ii. pl. 1217–1219.

one time I had considerable doubt about it, for I thought the case might be put in this form: If a person sells a share in real estate for the sum of £1000, the person who sells and conveys that share would have a lien upon it for the amount of the purchase-money. I am disposed, however, to think that was not the transaction here. It was not a sale, but it was this: the testator says, "You shall have no legacy unless you convey your shares." They did convey, but the executors did not pay the legacy. This, in my opinion, creates no lien upon the shares conveyed. Unquestionably they had an election in the first instance; they might have given up their legacies and retained the property, but till they conveyed it there was no right to the legacies. They did not then convey, making any terms as to the payment of the legacies, but they performed the condition absolutely. They might unquestionably have done this, have bargained with their brothers that the legacies should remain a charge upon the shares until the legacies were paid; but there was no contract of that description; and the question, which is a somewhat novel one, I think, and which was very fully argued before me, is this: whether, on the construction of the will, this express condition that each daughter shall, at the request and costs of the sons, convey her estate, does create a charge upon the property conveyed. I think this is a mere personal obligation, and that it does not create a charge.

Solicitors: Messrs. *Torr, Janeway, & Co.*, agents for Messrs. *A. G. & T. W. Eastwood, Todmorden;* Messrs. *Rickards & Walker*, agents for Mr. *James Stansfield, Todmorden.*

M. R.

1870

June 28.

In re RUSH.

Judgment Creditor—Sequestration—Real Estate delivered in Execution—Sale— 27 & 28 *Vict. c.* 112, *ss.* 1, 4.

A debtor executed a conveyance of real estate to volunteers, and afterwards a writ of sequestration was issued against him at the instance of a creditor. The volunteers reconveyed the estate to a trustee for the sequestrators; and they entered into possession:—

Held, that the sequestrators and creditor were entitled to an order for the sale of the real estate under 27 & 28 Vict. c. 112.

IN this case, *G. R. Rush*, a solicitor, had failed to comply with an order for payment of a balance of account found due from him upon taxation, at the instance of a client, of a bill of costs; and sequestration had issued against him.

Previously to the issue of the writ, *Rush* had executed voluntary conveyances of certain real estate belonging to him; but the persons in whose favour such conveyances were made did not choose to dispute the title of the sequestrators, and reconveyed to a trustee for them; and they had entered into possession of the estates.

The sequestrators and the creditor now presented a Petition for sale of the estate under 27 & 28 Vict. c. 112.

Mr. *Jessel*, Q.C. (Mr. *F. H. Colt* with him), said the only question was, whether the land had actually been delivered in execution by virtue of a writ of elegit, "or other lawful authority," within the meaning of sects. 1 and 4 of the Act.

Rush did not appear.

The MASTER OF THE ROLLS made the order.

Solicitors: Messrs. *Langley & Gibbon.*

In re MUGGERIDGE.
MUGGERIDGE *v.* SHARP.
Ex parte BANK OF LONDON AND NATIONAL PROVINCIAL INSURANCE ASSOCIATION.

M. R.
1870
July 9.

Unregistered Company—Winding-up—Liability of Contributory—Specialty Debt—Companies Act, 1862, *ss.* 75, 199—*Deceased Contributory—Administration of Assets—Proof by Liquidator.*

10 Ch 49

The liability of a shareholder of a company not registered under the Act of 1862, but wound up under it, to contribute to the assets of the company, is in the nature of a specialty debt.

The liquidator of such a company is entitled to prove against the estate of a deceased contributory for the estimated value of such liability, although no call has actually been made in the winding-up, and to have a proportionate share of the fund set apart to meet it.

THIS was a suit, commenced by summons, for the administration of the estate of Sir *Henry Muggeridge*, who died on the 27th of June, 1866. He was at the time of his death the registered proprietor of 2500 shares, of £5 each, in the *Bank of London and National Provincial Insurance Association*, upon which £1 per share had been paid up.

On the 22nd of January, 1870, an order was made, under the *Companies Act*, 1862, for winding up the association, which had never been registered under any Act of Parliament. The executor of Sir *Henry Muggeridge* was placed on the list of contributories. The list, however, had not been finally settled, nor had the claims of creditors been adjudicated upon; but the official liquidator deposed that it would be necessary for the purposes of the winding-up to make a call on the contributories of not less than £1 per share.

The usual decree was made in the suit on the 18th of July, 1866. The estate proved to be insolvent, and, in fact, was insufficient to pay the specialty creditors in full. The Chief Clerk made his certificate, which became binding on the 13th of April, 1870, and the cause came on for further consideration on the 14th of June, 1870, when an order was made that so much of the estate of the testator as had been got in should be applied in payment of

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the specialty creditors found by the certificate, among whom the liquidator of the company was not included.

This order had not been drawn up, and a Petition was presented by the liquidator, praying that he might be allowed to rank as a specialty creditor on the estate for £2500, being the estimated value of the liability of Sir *Henry Muggeridge* to contribute to the assets of the company in respect of his 2500 shares, and for interest thereon; and that, notwithstanding the order made on further consideration, the moneys thereby directed to be apportioned might be apportioned between the Petitioner and the other specialty creditors. This Petition now came on to be heard.

Mr. *Rodwell*, for the liquidator, submitted that by sects. 75 and 199 of the *Companies Act*, 1862, the liability was of the nature of a specialty debt, and that, as no call had been made, the official liquidator was entitled to prove for the estimated value of the liability.

Mr. *Bristowe*, Q.C., Mr. *William Barber*, and Mr. *Higgins*, for specialty creditors:—

First: We say that sect. 75 applies only to companies registered under the Act of 1862. By sect. 5 the Act is divided into nine parts, of which the fourth relates to the winding up of companies and associations "under this Act," and the eighth to the application of the Act to unregistered companies. Part 4 commences at sect. 74. Sect. 75 is as follows:—"The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty)." The company in question was never registered under the Act, and was ordered to be wound up only by virtue of the provisions contained in Part 8. Unless, then, that part contains some express enactment making sect. 75 applicable to unregistered companies, the debt is only a simple contract debt: *Robinson's Executor's Case* (1). The only words which can have such an effect are those in sect. 199:—"Subject as hereinafter mentioned any partnership, association, or company, except railway companies incorporated by Act of Parlia-

(1) 6 D. M. & G. 572.

ment, consisting of more than seven members, and not registered under this Act, and hereinafter included under the term unregistered company, may be wound up under this Act, and all provisions of this Act with respect to winding up shall apply to such company, with the following exceptions and additions;" these exceptions and additions do not affect the present question. We submit that the effect of this enactment is merely to make the machinery provided by the Act for winding up registered companies applicable to the winding up of unregistered companies; but does not in any way alter the nature of a contributory's liability.

Secondly: If the Court is against us on the first point, we submit that the liability is merely a contingent one; the list of contributories has not been finally settled, and no call has been made. Under these circumstances the Court will not prevent the estate from being applied in payment of specialty debts which are both due and payable: *Williams* on Executors (1); *Read* v. *Blunt* (2); *Norman* v. *Baldry* (3); *Dean* v. *Allen* (4); *Williams* v. *Headland* (5); *Henderson* v. *Gilchrist* (6).

Mr. *Bevir*, for the executors of Sir *Henry Muggeridge*.

LORD ROMILLY, M.R.:—

This is clearly a specialty debt under the *Companies Act*, 1862, although it is not so under the older Acts. The section relating to unregistered companies is the 199th, which says this: that "all the provisions of this Act with respect to winding-up shall apply to such company, with the following exceptions and additions," which do not affect the question. Then, is sect. 75 a provision of the Act with respect to winding-up? Now, by sect. 5, the Act is divided into eight parts, of which the fourth relates to the winding up of companies; and sect. 75 is included in Part 4, and for that reason alone I should hold that that section was a "provision of the Act with respect to winding-up." But when you come to the contents of the section itself, there really can be no question about it. The words are these:—"The liability of any person to con-

(1) 6th Ed. vol. ii. p. 955.
(2) 5 Sim. 567.
(3) 6 Ibid. 621.
(4) 20 Beav. 1.
(5) 4 Giff. 505.
(6) 17 Jur. 570.

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tribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing due from the person when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter is mentioned, for enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls as well as calls already made." This section makes the liability of the contributory a debt, and it is the only thing that makes it a debt, so that when a person is a shareholder in a company, and the company is ordered to be wound up, the Act immediately declares that this creates a debt, which accrued due when the shareholder's liability commenced, but is payable when a call is made; and the debt is to be proveable in bankruptcy. This section was very much considered in *Hastie's Case* (1), and it was held that the liability of a contributory was *debitum in præsenti, solvendum in futuro*. If, then, it be a debt, and this section alone make it a debt, why is it not to be a specialty debt? Why should I strike out the words "in *England* and *Ireland* of the nature of a specialty?" I cannot strike them out; and, being of opinion that sect. 199 makes this section apply to unregistered companies, I must hold this to be a specialty debt.

Then the next question is, will the Court set apart anything to meet it? I apprehend that the Court has no option. All that the Court does is not to disturb any payment which has been made before the debt is claimed. Here no payment has been made; the only question is, whether the Court is not bound to set apart a fund to meet a claim which is estimated at £2500. I am of opinion that a proportionate share of the fund in Court must be set apart and carried to a separate account in order to meet the claim; and, as usual in such cases, the claimants must add their costs to their debt.

Solicitors: Messrs. *Paine & Layton;* Messrs. *Rogers, Jull, & Rogers;* Messrs. *Garrard & James.*

(1) Law Rep. 7 Eq. 3; Ibid. 4 Ch. 274.

WONHAM *v.* MACHIN.

M. R.
1870
July 12, 14.

Mortgage—Puisne Incumbrance—Sale of Mortgaged Property—Costs of Sale.

Where, at the instance of a mortgagee Plaintiff, a decree is made for sale of the mortgaged property, and a puisne mortgagee concurs in a conveyance to a purchaser under the decree, such puisne incumbrancer is not entitled to any costs in respect of such concurrence unless the prior incumbrancer has been paid in full.

THIS was the further consideration of a suit, by a second mortgagee of real estate, for the sale of the mortgaged property, and application of the proceeds of sale in discharge of the incumbrances. A decree for sale was made with the consent of the first mortgagee, in whom the legal estate was vested. The property was put up for sale in lots, under conditions which provided as follows:—"No purchaser shall require any incumbrance to be discharged otherwise than by the incumbrancers joining in the purchaser's conveyance, or make any claim for costs in reference thereto, or require from any conveying party any other covenant than a covenant that he has not incumbered, or require for any purpose the concurrence of any person in respect of any beneficial interest bound by the decree or order for sale, or require any such decree or order to be enrolled." The proceeds of sale were sufficient for payment of the first mortgagee in full, but not of the second mortgagee.

The only question was, whether a puisne incumbrancer, who had joined in conveyances to several of the purchasers, was entitled to his costs of executing the conveyances.

Mr. *Jessel*, Q.C., and Mr. *Batten*, for the Plaintiff:—

This incumbrancer had no legal estate, and his equitable interest was bound by the decree. If the decree had been for foreclosure, he would have had no costs of suit unless he had redeemed; the law now allows a decree for sale to be made; but why should he be entitled to any costs when I am not paid in full? There can be no difference in principle between costs of suit and costs of joining in a conveyance: *Ward* v. *Mackinlay* (1); *Dighton* v. *Withers* (2);

(1) 2 D. J. & S. 358. (2) 31 Beav. 423.

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Hepworth v. *Heslop* (1); *Upperton* v. *Harrison* (2); *Barnes* v. *Racster* (3); *Wild* v. *Lockhart* (4); *Morgan* and *Davey* on Costs (5).

Mr. *Tyssen*, for the first mortgagee and the purchasers.

Mr. *Southgate*, Q.C., for the puisne incumbrancer:—

The cases cited do not touch this point; they all relate to the costs of suit: and even with reference to these costs there was very great doubt until the decision in *Ford* v. *Earl of Chesterfield* (6). It is very difficult to understand why the puisne incumbrancer was made a party to the conveyance at all as he had no legal estate, and was bound by the decree; but it must have been either for some reason beneficial to the parties to the cause or by the Plaintiff's blunder; *quâcunque viâ*, he is entitled to his costs.

July 14. LORD ROMILLY, M.R.:—

I do not think the precise question in this case has ever been decided. It is admitted that in general a mortgagee is entitled to add his costs to his debt, and to be paid his principal, interest, and costs out of the fund. There is some distinction between costs of suit and costs of a sale of property in the suit. One distinction is that, where the mortgagee of a deceased mortgagor files a bill, he may make the suit for the administration of the estate of the deceased, and then the costs of the suit are paid in the first instance. But if, in the course of administration, it becomes necessary to sell the mortgaged property, then the mortgagee is entitled to be paid his principal, interest, and costs out of the proceeds of sale in priority to the costs of suit and everything else.

Here the mortgagee has instituted a suit asking for a decree for sale instead of foreclosure, and a decree is made, and thereupon a puisne mortgagee concurs; then the question is, whether the costs of sale are not to be paid in the first instance. I am of opinion that no distinction can be drawn between the costs of suit and the costs of sale. Both sets of costs are necessary for realizing the

(1) 3 Hare, 485.
(2) 7 Sim. 444.
(3) 1 Y. & C. Ch. 401.
(4) 10 Beav. 320.
(5) Page 158.
(6) 21 Beav. 426.

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property, and in the absence of any agreement as to the payment of them, I am unable to draw any distinction between them. A puisne mortgagee may concur in the sale only on the terms of being paid his costs; but nothing of the kind took place here. The costs of sale are considerable, and the sale has not produced sufficient to pay the Plaintiff in full, and under these circumstances I think he must be paid in the first instance.

It is true that there are cases where costs of sale are distinguished from costs of suit, but these relate not to insolvent but to solvent estates; as, for example, where real and personal estate have been realized, and the Court has come to the conclusion that the costs of realizing the real estate ought not to be thrown upon the personal estate. These cases have no bearing on the present, and I have only alluded to them for the purpose of shewing that I have not neglected the consideration of them.

Solicitors: Mr. *J. M. Yetts;* Messrs. *Poole & Hughes.*

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Vendor and Purchaser—Specific Performance—Doubtful Title.

Discussion of the circumstances under which the Court will not decree specific performance, on the ground that the title is too doubtful to be forced on a purchaser.

The principles laid down in *Pyrke* v. *Waddingham* (1) approved of; but the decision disapproved of, and not followed under precisely similar circumstances.

THIS was a suit for specific performance by the vendors of certain real estate, part of the *Notgrove* estate, in the county of *Gloucester*.

The *Notgrove* estate was formerly the property of *Thomas Pyrke*, who, by his will, dated the 27th of February, 1752, after confirming certain leases of the said estate, and giving certain pecuniary legacies, and also a life annuity of £40, which he directed to be paid out of his estate, gave to his wife *Dorothy*, whom he appointed executrix, all his manors, lands, tenements, goods, chattels, and

(1) 10 Hare, 1.

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stock of what nature soever, with all his ready money, and the interest of all securities for money, for the term of her natural life; and when she died her funeral expenses to be paid by his heir according to such directions as she should give before her death or leave behind her in writing. The will then proceeded as follows:—

"I give (after my wife's death) all my manors, lands, tenements, and interest of all my money and securities for money—I mean only the interest of them—and chattels, to my nephew *Joseph Watts*, for his life, with liberty to make a jointure of any part of the estate, and also to make leases of any part thereof, not exceeding twenty-one years, reserving the best rent he can get for the same premises so leased, and having all usual covenants inserted in such leases on the lessee's part to be done and performed, and such lessee or lessees executing counterparts of such leases; and if the said *Joseph Watts* shall die, and leave one or more son or sons, I give my said estate to his eldest and every other sons, the eldest to take place before the younger, according to their priority of birth. If the said *Joseph Watts* shall happen to die and leave no son, but only one or more daughters, I give him power to charge the estate with £5000, and no more, for their provision; and if the said *Joseph Watts* shall die and leave no son, then I give my estates to *Robert Pyrke*, son of the late Rev. Mr. *Pyrke*, and nephew to Mrs. *Collier*, upon the same terms and conditions as I give it to *Joseph Watts*. And if the said *Robert Pyrke* shall happen to die and leave no son, but shall leave one or more daughters, I give him leave to raise £4000 out of the estate for their provision; I then give my said estate and estates to the first, second, and other sons of the late Mr. *John Skippe*, upon the same conditions as before-mentioned to *Joseph Watts* and *Robert Pyrke*; and in case all those sons shall die without issue male, then I give my said estates to the eldest and every other son and sons of Mr. *George Skippe* successively, and their heirs, for ever, paying to their brother *Thomas Skippe* £500, and to their sister *Kitty* the same sum. When I mention sons, I mean those which are lawfully begotten. It is my intent and meaning, and I do hereby order and appoint, that, in case any of the person or persons to whom I have given my said estate under the limitations aforesaid, shall be under the age of twenty-four years when they have a right to the

estate, that then the rents and profits of my estates shall be received by Mr. *Whitchurch*, the Rev. Mr. *Yate*, and Mr. *John Robinson*, who I appoint trustees of this my will, in trust that they shall apply a reasonable part of such rents for the maintenance and education of such person as shall have a right to the estate, but under the age of twenty-four years, namely, not exceeding £50 a year till they are of the age of twenty-one years, and £100 a year until they are twenty-four years of age. I give to my trustees £20 each. I also order and appoint that, after deducting all necessary expenses belonging to their trust, my trustees shall put out to interest money that shall be due for rent or on my securities, till *Joseph Watts*, or any other person entitled, shall attain the age of twenty-four years, and if *Joseph Watts* attains that age, that then he shall have possession of all my estates and securities for money, after he has discharged all legacies and payments ordered by this my will to be paid and discharged upon the conditions aforesaid. I also order that, if the said *Joseph Watts*, or any of the *Skippes*, shall be entitled to the estate by this my will, that they shall change their names to that of *Pyrke* within two years, otherwise the estate shall go to the person next entitled to it." The testator also directed that after his wife's death the person entitled to his estate, or his trustees, should lay out £70 for a monument to be erected in the church of *Little Dean*, in memory of himself and his children.

The testator died on the 7th of March, 1752. *Dorothy Pyrke*, his widow, died in 1762.

Joseph Watts, the nephew of the testator, who was also his heir-at-law, attained the age of twenty-four in December, 1764, and thereupon entered into possession of the testator's real estate, and assumed the surname of *Pyrke*. In 1766 he intermarried with *Charlotte Evans;* and by the settlement made on the marriage the testator's estates were settled upon the issue of the marriage in tail male, subject to a jointure out of the *Notgrove* estate in favour of *Charlotte Evans* for her life. By an indenture of feoffment, dated the 31st of January, 1798, and a fine levied in pursuance of a covenant therein contained, the *Notgrove* estate was conveyed to the use of the said *Joseph Pyrke* (hereinafter called the elder) in fee. In the same year, 1798, a common recovery was duly suffered,

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in which *Joseph Pyrke* the younger, the eldest son, and afterwards the heir-at-law of *Joseph Pyrke* the elder, was vouchee: and it was declared that such recovery should enure to the use of *Joseph Pyrke* the elder in fee.

Joseph Pyrke the elder, by his will, dated the 16th of January, 1802, devised the *Notgrove* estate to his wife *Charlotte* for life, with remainder to *Joseph Pyrke* the younger, charged with certain annuities and legacies. He died in 1803, leaving *Joseph Pyrke* the younger his heir-at-law, and also five younger sons him surviving.

In 1806 a recovery was duly suffered, in which *Joseph Pyrke* the younger was vouchee: and it was declared that such recovery should enure, in the first place, to confirm the life estate of *Charlotte Pyrke*, the widow, and subject thereto, to the use of *Joseph Pyrke* the younger, his heirs and assigns, but subject to the annuities and legacies charged or intended to be charged on the *Notgrove* estate by the will of *Joseph Pyrke* the elder. By a deed-poll, dated the 12th of February, 1806, the five younger sons of *Joseph Pyrke* the elder released unto *Joseph Pyrke* the younger, his heirs and assigns, all remainders, estates, rights, claims, and demands whatsoever under or by virtue of the wills of *Thomas Pyrke* and *Joseph Pyrke* the elder, or either of them, or otherwise howsoever, in, to or out of the hereditaments or real estate of *Thomas Pyrke* or *Joseph Pyrke* the elder, or either of them.

Charlotte Pyrke, the widow of *Joseph Pyrke* the elder, died in May, 1835.

Joseph Pyrke the younger died in January, 1851, having devised the *Notgrove* estate to his only son *Duncombe Pyrke* in fee.

In 1851 *Duncombe Pyrke* entered into a contract for the sale of the *Notgrove* estate to a person named *Waddingham*, who refused to complete his contract on the ground that, upon the true construction of the will of *Thomas Pyrke*, *Joseph Pyrke* the elder took an estate for life only, with remainder to his eldest and every other sons successively for their respective lives only, and that the remainders, limited to take effect upon the death of the survivor of such sons, were vested and not contingent remainders, and consequently were not barred or affected by the feoffment, fine or recoveries, but were still subsisting and capable of taking effect. A suit of *Pyrke* v. *Waddingham* was thereupon instituted for

specific performance of the contract, and came on to be heard in 1852 before Sir *G. J. Turner*, then Vice-Chancellor. His Honour's opinion was much in favour of the title; but being unable, as he stated in his judgment, to base that opinion upon any general rule of law, or upon any reasoning so conclusive as fully to satisfy his mind that other competent persons might not entertain a different opinion, or that the purchaser, if compelled to take the title, might not be exposed to substantial and not merely idle litigation, or even that he would be free from all possible hazard, he refused specific performance, and dismissed the bill with costs. The case is reported (1).

The survivor of the sons of *Joseph Pyrke* the elder died in June, 1855.

In 1857, *Duncombe Pyrke*, upon the occasion of the marriage of his eldest son, executed a settlement of the *Notgrove* estate. The Plaintiffs in the present suit were trustees of this settlement, and had under it power to sell the *Notgrove* estate, either together or in parcels, and to receive the purchase-money and to give receipts.

In February, 1870, the Plaintiffs contracted to sell part of the *Notgrove* estate to the Defendant, who took the same objection as had been taken by the Defendant in the suit of *Pyrke* v. *Waddingham* (1); and thereupon the present suit was instituted, and now came on to be heard.

Mr. *Jessel*, Q.C., and Mr. *Bevir*, for the Plaintiffs:—

The only possible construction of the will upon which the Defendants can succeed is this: that *Joseph Watts* took an estate for life, with remainder to his sons successively for life, with remainder to *Robert Watts*, omitting altogether the words of contingency. It is quite plain that such a construction could never be upheld.

Mr. *Southgate*, Q.C., and Mr. *Leonard Field*, for the Defendant:—

We rely on *Pyrke* v. *Waddingham*. Nothing has happened, since the decision in that case, to give the Plaintiffs any better title than the vendor had then. The late Lord Justice *Turner*, to the end of his life, held that decision to be correct; and other

(1) 10 Hare, 1.

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Judges have approved of it: *Collard* v. *Sampson* (1); *Freer* v. *Hesse* (2); *Rogers* v. *Waterhouse* (3); *Falkner* v. *Equitable Reversionary Society* (4); *Hamilton* v. *Buckmaster* (5).

LORD ROMILLY, M.R.:—

24 LJ Ch 16 Mr. *Jessel*, I will tell you what my present view of the case is, although I may perhaps desire to consider it a little more before I finally decide it.

In the first place, upon the construction of the will, I entertain no doubt that a good title can be made.

I adopt entirely the view expressed by Lord Justice, then Vice-Chancellor, *Turner*, with respect to the species of doubt which ought to prevent the Court from enforcing specific performance in the way he expresses it. Such a case must, I think, come within one of three divisions. First, where there has been a decision adverse to the title or to the principle on which the title depends, which the Court is of opinion is wrong (of course if the Court is of opinion that the decision is right, it is simply a bad title), in which case the Court will not rely upon its own opinion against a decision already pronounced, and will not enforce the title. Another case is where there is a decision in favour of the title, but the Court is of opinion the decision was not right: such, for instance, was the case before me of *Collard* v. *Sampson*, where I expressed an opinion that the case was settled by a decision of Vice-Chancellor *Wigram*; and, although I had some doubts about that decision, yet I thought that it would never be reversed; but the Lords Justices thought that the point was not completely settled. I doubt whether it was in my power to act on an opinion unfavourable to that decision; but, assume I had followed the decision of Vice-Chancellor *Wigram*—and the Lords Justices had also followed it—does anybody believe that any Court would ultimately have reversed those three decisions, and that the purchaser would have taken at all a doubtful title? The third division, which I think is the difficult one, is where there is a known difficulty in the title. For instance, when I was at the Bar, there was a great question whether

(1) 16 Beav. 543; 4 D. M. & G. 224.
(2) 4 D. M. & G. 495. 17 Jur 705.
(3) 4 Drew. 329.
(4) Ibid. 352. 4 Jur NS
(5) Law Rep. 3 Eq. 323.

(4 SC 17 Jur 569, 641,

a mere contingent remainder could be too remote or not. Suppose there were a title depending on that question alone, or on several other questions which were known to be questions discussed among conveyancers, the Court would say, "I will not decide that question incidentally in enforcing the title upon a purchaser." Those are cases in which, undoubtedly, you could not compel the purchaser to take the title.

Another case is pointed out by Vice-Chancellor *Turner*, in which it is undoubtedly true that the Court will not decree specific performance, although I think it comes rather within another rule, where the validity of the title depends upon facts or a fact the exact accuracy of which you have no means of judging. Then, of course, you will not force the title upon anybody. In truth, the vendor has not made out a good title; because, if it depends upon a particular fact, that fact must be proved, and if he does not prove it, he has not made out a good title. Therefore, I do not think the case put forward by the Vice-Chancellor comes within the case of a doubtful title.

But what strikes me very much in all these cases is this: in the first place it is a great scandal to the public and the profession generally that there should be a case in which a Court of Law is not able to determine what the law is. I admit the law is very difficult to determine, but I hope that, by means of improvements, the law will ultimately be reduced into a state that a man of ability, who has devoted his whole life to the subject, may be able to tell a person what the law really is on any one point. That state of things, I hope, may be arrived at; but it is not so now, and will not be so in my time. But, conceive what the extent of the evil would be if a man of a naturally doubtful disposition—a man who is disposed to exaggerate objections and difficulties, who is diffident of his own judgment—is to say, in every case in which he thought it possible that another man of a reasonable mind might differ from him in opinion, he would not in that case force a title upon anybody. If that were the case, you would have done much to produce that disastrous result which all persons, particularly conveyancers, desire to deprecate, namely, that you throw more doubts upon titles, and render them less marketable than by any conclusion you could come to. I think if a person has a very serious doubt

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upon a particular point of law, which is submitted to him, and cannot see that the reasons are strongly in favour of one view or the other, he ought not to force that title upon another person; but he ought to weigh and consider those reasons, and if he finds them really preponderating, he ought so to decide. The reason, unquestionably, why the Court has so held in these cases of specific performance is, that the question will or may ultimately have to be litigated with another person, and that the conclusion will not bind the litigant parties; but this is also to be considered, that if there is one decision by a competent tribunal sufficiently clear not to be appealed from, or, if it is appealed from, to be adopted by the Court of Appeal, that ought to bind subsequent Judges, unless it is unquestionably against the whole current of authorities, which is very unlikely to be the case, particularly in the present time, when so much care is taken by counsel in the argument to sift the cases before different Judges and different tribunals. But if the principle which I stated before is the rule to lay down with respect to not forcing a doubtful title on a person, it will not only produce the result I have already stated, but, in the present instance, it goes far beyond it; because, I must say, with the greatest possible respect and admiration for the legal abilities of my late lamented friend, Lord Justice *Turner*, no man was more confident of his own opinion, and no man thought it less likely that a man of sense would differ from him. If he had decided it the other way, I am satisfied he would have believed any reasonable man would also have decided the same way. I confess I came to very much the same conclusion myself; and if the rule is that the Judge ought to enforce the title whenever he really and sincerely believes that a man of sense will not differ from him on the construction he has come to in that particular case, then, applying that rule to this case, I do not think any sensible man would differ from me in the conclusion I come to in this case.

Such is the general view I take of the matter; and, therefore, adopting all Lord Justice *Turner's* judgment on the subject, the application of it to his mind and to mine makes the only difference between us. However, let the case stand till Monday morning, and in the meantime I will look into it a little more fully, and, if necessary, I will hear a reply.

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July 18. LORD ROMILLY, M.R. :—

I do not think it is necessary for me to say more upon this subject than I said on the former occasion when it came before me. I then stated very fully what my opinion was with respect to the mode in which the Court ought to deal with cases of this description. I expressed my assent to the principles and grounds upon which the Lord Justice *Turner* stated that the doubt was sufficiently considerable to induce the Court to abstain from enforcing specific performance. The only point upon which I did not concur with the learned Judge in that respect was this, that I doubted whether the application of it to that case was in strict accordance with the rules which he himself laid down. I certainly, upon looking at the case very carefully (for it is a question on the construction of a will), am of opinion that no sufficient doubt occurs in the case of *Pyrke* v. *Waddingham* (1) to induce the Court, in accordance with any of the rules laid down by Sir *George Turner* himself, to abstain from enforcing specific performance in that case. If that were so at that time, I think it is still less so on the present occasion, because Lord Justice *Turner* expressed his opinion with reasonable strength in favour of the Plaintiff in that case. I am of opinion also that there is no question about it. I think the points must be decided in the Plaintiff's favour. I think there was a contingent gift to the sons, and I think also there was an ultimate remainder in tail to the father. Therefore I am of opinion that no sufficient doubt arises for the withholding by the Court of the exercise of that jurisdiction which, I think, it is the right of every person to require from the Court, provided the Court entertains no doubt upon the question. As my opinion is confirmed by Lord Justice *Turner* on this subject, I shall make a decree for the specific performance of the agreement; but I think it must be considered that this is very much in the nature of a special case, submitted for the opinion of the Court. Therefore there ought to be no costs.

I am bound to say, if Lord Justice *Turner* had expressed an opinion unfavourable to the title, however much that might have surprised me, I should have considered it a case too doubtful to

(1) 10 Hare, 1.

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enforce specific performance against a purchaser. I state that in order to shew the way I view the rule which he laid down and enunciated.

Solicitors: Messrs. *Peacock & Goddard;* Mr. *W. H. Herbert.*

M. R. 1870 *July* 6, 19.

In re NORTHERN ASSAM TEA COMPANY. *Ex parte* UNIVERSAL LIFE ASSURANCE COMPANY.

Company — Debenture — Assignment — Set-off — Lien — Assignment subject to Equities—Release of Equities—Course of Conduct.

The assignee of a *chose in action* takes it, subject to all equities available against the assignor; but the person entitled to such equities may release them, either expressly or by implication arising from his course of conduct.

The articles of association of a company provided that the company should have a primary lien on the debentures of any member of the company who might be either absolutely or contingently indebted to the company for any amount or on any account, and that the directors might, after any such debt became absolutely payable, sell and transfer any debentures of the member so indebted or liable. The holder of certain debentures, who was also a shareholder, transferred his debentures in August, 1865, and the transferees were registered as the proprietors of the debentures, and received certificates to that effect from the company. In 1866 and 1867 calls were made on the shares held by the transferor, which were unpaid. In December, 1867, the company fell into difficulties, and applied to the transferees of the debentures to renew them for a period of three years:—

Held, that the company had precluded themselves by their conduct from setting up their lien for unpaid calls as against the transferees.

Higgs v. *Northern Assam Tea Company* (1) followed and approved.

THIS was a claim by the *Universal Life Assurance Company* to prove against the *Northern Assam Tea Company, Limited,* now in liquidation, certain debentures of which the *Assurance Company* were the holders; and the question in dispute was, whether these debentures were held subject to any lien or right of set-off in the *Northern Assam Tea Company.* The facts (which were similar to those in the reported case of *Higgs* v. *Northern Assam Tea Company*), were stated in admissions made for the purposes of the claim, and may be briefly summed up as follows:—

(1) Law Rep. 4 Ex. 387.

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On the 17th of October, 1864, an agreement was made between one *Edward Hood Higgs* and *E. W. Wingrove* on behalf of the *Northern Assam Tea Company*, whereby the former agreed to sell, and the latter to purchase, certain estates in the province of *Northern Assam* for the sum of £54,000, to be paid as follows: £7000 in cash on or before the 15th of November, 1864, and £47,000 in debenture bonds, which were to carry interest at the rate of 5 per cent. from the 1st of January, 1865, and to be delivered to *Higgs* on the completion of the transfer of the estates, and to be redeemable as follows: £8000 on the 1st of January, 1868; £10,000 on the 1st of January, 1869; £14,000 on the 1st of January, 1870; and £15,000 on the 1st of January, 1871: and *Higgs* was to have a lien for the unpaid purchase-money on the estates. *Higgs* guaranteed that the net annual profits for the first three years should be such as would enable the directors to declare a dividend of not less than 10 per cent.; and by way of security for the performance of such stipulation the directors were empowered to retain a reasonable number of the debentures, and the company were to have a lien on the debentures so retained for any deficiency of profits.

On the 22nd of October, 1864, the *Northern Assam Tea Company* were incorporated and registered under the *Companies Act*, 1862. By the 3rd of the articles of association the above-mentioned agreement was confirmed, and the provisions thereof, so far as they were applicable to the company, were to be deemed to be and to be construed as part of the articles, without prejudice to the power of the directors to alter and vary the same if they should think fit to do so. And by clause 18 it was provided as follows:—

"The company shall have a primary lien on the share or shares, debenture or debentures, and dividends or profits of any member who may be either absolutely or contingently indebted or liable to the company in any amount and on any account whatsoever, and that whether such member is liable or indebted solely or jointly with any other person or persons, and whether the debt be actually payable or not. And the board of directors may, after any such debt has become actually payable, absolutely sell, dispose of, and transfer all or any one or more of the shares or debentures of any member so indebted or liable to them as aforesaid, and may

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apply the proceeds of such sale in or towards the payment or satisfaction of the said debt or liability; and the consent of any such member shall not be necessary for giving validity to such sale, disposition, or transfer; and the purchaser of any such share or shares, debenture or debentures, shall not be bound to ascertain whether such power of sale shall have arisen; and a resolution of such board that such sale shall be made, and the entry of the name of the purchaser in the company's share register as the holder of such share or debentures, shall as well confer a good title both at law and in equity on the purchaser against such member and all other persons whatsoever, as also exempt the purchaser from all liability in respect of his purchase-money; and any such member so indebted or liable as aforesaid shall, on demand by or on behalf of such board, deliver up to such board or to its appointed agent each and every of the certificates of shares, debenture or debentures, which such member shall hold in respect of such share or shares, debenture or debentures so sold and disposed of as aforesaid; and any such member neglecting to deliver up such certificate or debenture as aforesaid for seven days after such demand as aforesaid, shall be deemed to have wrongfully converted them, and become and be liable to pay substantial damages to the company in respect thereof in any action to be commenced by the company for that purpose."

On the 4th of April, 1865, the purchase of the estates was completed by *Higgs* executing the conveyance to the company, and the whole of the debentures agreed to be delivered to him were actually handed over to him, with the exception of 150 of £100 each, payable on the 1st of January, 1871, which were retained as security for the performance of the stipulations of the agreement.

Each of the debentures was in the form of a deed-poll; and after reciting the agreement of the 17th of October, it was thereby witnessed as follows: "The said *Northern Assam Tea Company, Limited*, hereby bind themselves to pay to the said *Edward Hood Higgs*, his executors, administrators, or assigns, on the 1st day of January, 1868, the principal sum of £100 sterling, and also to pay interest thereon at the rate of £5 per cent. per annum, half-yearly, on the days mentioned in and on presentation of the respective coupons hereto annexed, until payment of the said principal."

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Higgs from time to time sold and transferred the debentures to various persons; and in particular he, by an indenture dated the 12th of August, 1865, transferred 150 of these debentures, and also the unpaid purchase-money of £15,000 represented thereby, and all his lien for the said unpaid purchase-money of £15,000, to the trustees of the *Universal Life Assurance Company*, by way of mortgage, to secure the repayment of £6000 advanced to him by the company, with interest. This indenture was in due course lodged at the office of the company for registration, and was, in pursuance of the provisions of the *Companies Act*, 1862, s. 43, registered in the register of mortgages, and certificates were issued to the trustees of the *Assurance Company*, certifying that they had been entered on the register of mortgages as the registered proprietors of these 150 debentures. The directors did not inform the transferees that the company had or would claim any right of set-off.

The company from that time paid interest on these debentures to the holders; but in December, 1867, they fell into difficulties; and on the 13th of that month a letter was written by the secretary of the company to the trustees, informing them, "as the holders" of the debentures, that the company were unable to satisfy their claims in a cash payment, and requesting that the bonds might be renewed for a period of three years.

On the 23rd of February, 1866, the *Northern Assam Tea Company* conveyed the estate to *Higgs*, by way of mortgage, to secure the payment of the unpaid purchase-money. This mortgage contained a power of sale, and it was declared that the mortgagees should hold the proceeds of sale in trust, after payment of expenses, to pay to "the holders for the time being" of such of the debentures as should for the time being remain unpaid the amounts secured to them respectively, rateably and *pari passu*, without preference or priority, according to the amounts secured thereby respectively.

On and before the 12th of August, 1865, the date of the transfer, *Edward Hood Higgs* was the registered owner of shares in the company, on which calls were made subsequently to that date. Default was made in payment of these calls, and on the 13th of December, 1867, the date of the letter from the secretary to the

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trustees, and also on the date of the winding-up order, these calls were, and still continued to be, due and unpaid. *Higgs* had been settled on the list of contributories for 1635 shares, upon which further calls had been made in the winding-up. The total amount of calls remaining unpaid was £17,830.

Mr. *Jessel*, Q.C., (Mr. *Philbrick* with him), for the claimants, relied on the decision in *Higgs* v. *Northern Assam Tea Company* (1).

Mr. *Swanston*, Q.C., and Mr. *Higgins*, for the liquidator of the *Northern Assam Tea Company*:—

This case is governed by the decision in *Ex parte Mackenzie* (2). The liability of a shareholder to pay calls dates from the contract to take the shares: sect. 75 of the *Companies Act*, 1862; *Williams* v. *Harding* (3); consequently, there was a liability on the part of *Higgs* existing at the time of the transfer, and in respect of this liability the company would have a right of set-off independently of the provisions of the articles of association; but to put the matter beyond doubt, by clause 18 of the articles of association of this company, the company have a lien on debentures for unpaid calls. These debentures are *choses in action*, and the assignee must take them subject to the equities affecting them: *In re Natal Investment Company* (4); *In re General Estates Company* (5). There is nothing in the transaction between *Higgs* and the company to take this case out of the ordinary rule, as there was in *In re Blakely Ordnance Company* (6). The claimants rely very much on the registration of the transfer; but by sect. 43 of the *Companies Act*, 1862, the company was compelled to keep a register of mortgages. The object of the enactment was to prevent creditors of the company being deceived, and not to alter the rule that the person entitled to a *chose in action* can assign only subject to the equities: *Athenæum Life Insurance Society* v. *Pooley* (7).

(1) Law Rep. 4 Ex. 387.
(2) Ibid. 7 Eq. 240.
(3) Ibid. 1 H. L. 9.
(4) Law Rep. 3 Ch. 355.
(5) Ibid. 758.
(6) Ibid. 154.
(7) 3 De G. & J. 294.

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In re NORTHERN ASSAM TEA COMPANY. *Ex parte* UNIVERSAL LIFE ASSURANCE COMPANY.

July 19. LORD ROMILLY, M.R.:—

This is a claim made by the *Universal Life Assurance Company* against the *Northern Assam Tea Company*, for leave to prove upon certain debentures which have been issued by the company. I felt considerable difficulty about the case, and I have thought it necessary to look through all the authorities on the subject, and I think the result of them is this: This is a *chose in action*, and the assignment of a *chose in action* is taken subject to the equities; but any person may release those equities who is entitled to the benefit of them, and he may do so either positively, by words, or by writing, or by the whole course of his conduct; and the real question in this case is, whether the company have or not released these equities. Upon the whole, I have come to the conclusion that the company have released them, and by the course of conduct they have pursued have determined that the holders of these debentures should not take them subject to any of the equities which they had against *Higgs*.

In deciding this case I assent to the arguments addressed to me by Mr. *Swanston* and Mr. *Higgins*, with respect to the nature of the debt, the time when the debt arose, and also the liability of *choses in action* to the equities which have arisen; but while so doing I have come to the same conclusion upon it that the Court of Exchequer has done in *Higgs* v. *Northern Assam Tea Company* (1), which is the very same case. [His Lordship then stated the facts, and continued:—] It is very strongly put by the Judges in that case. What is meant by saying in the 18th article that the directors shall have the power of selling the debentures? I assent to the argument that the debentures were liable to the equities between the parties, that one of those equities was the liability for calls, and that that liability accrued the moment *Higgs* became a shareholder. But it was to the company that he was liable for the calls; and it was also the company who had a lien for the calls on the debentures, and a power of selling the debentures in order to enforce their lien. How are they to sell the debentures? Subject to the equities or discharged from them? It is quite clear, if they sell subject to the equities without ex-

(1) Law Rep. 4 Ex. 387.

M. R. 1870 *In re* NORTHERN ASSAM TEA COMPANY. *Ex parte* UNIVERSAL LIFE ASSURANCE COMPANY.

pressly so stating they may be committing a gross fraud, because they are selling a person a document said to be worth £100, and when the purchaser sues them for the £100, they say, "You bought it subject to the equities. Mr. *Higgs* is £50 or £60 in our debt; all you will get is £40 or £50." The clause cannot have a meaning which would lead to such a fraud. Then what takes place here? The debentures are mortgaged to the present claimants, who inform the company of that fact, and apply to get registered, and accordingly they are registered and treated as the holders of the debentures. Mr. *Higgins* cited to me a case of the *Athenæum Company* v. *Pooley* (1), to shew that registration will not assist the claimants; but I do not think that case has any application to the present. That was a case of a fraud committed by the directors upon the members of the company; they were liable for all their misconduct, and any equities of theirs could not tell against the shareholders. But in this case there is no pretence of any fraud, and the real question is, whether the company have not discharged these equities themselves by the course of their own conduct. It must be a very strong case to induce me to overrule *Higgs* v. *Northern Assam Tea Company* (2), which arose out of the very same facts, and which came before the Court of Exchequer, and was very carefully gone into by *Bramwell* and *Channell*, BB., whose observations are exceedingly pertinent. They did not decide on the pleadings in the action, but treated the question as if it were before them on a special case. They said it was obviously a purely equitable question, and they gave their answer with great distrust, owing to the state of the authorities. Their answer is this: that there is a set-off, but that the *Northern Assam Tea Company* have so contracted or conducted themselves that they cannot avail themselves of it:—[His Lordship then read various passages from the judgment, and observed that it appeared to him impossible to decide contrary to that case; and, consequently, that the *Universal Company* must be allowed to prove.]

Solicitors: Messrs. *Parke & Pollock*; Messrs. *Mercer & Mercer*.

(1) 3 De G. & J. 294. (2) Law Rep. 4 Ex. 387.

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BUBB *v.* YELVERTON.
Ex parte HASTINGS.

M. R.
1870
July 28, 29.

Ornamental Timber—Equitable Waste—Damage to Inheritance.

Although the Court of Chancery will grant an injunction to restrain a tenant for life from cutting down ornamental timber, irrespective of the question whether or not any damage would be occasioned to the inheritance by such cutting; yet, when the ornamental timber has been actually felled, and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damages can only be measured by the damage done to the inheritance.

THIS was a suit for the administration of the estate of the late Marquis of *Hastings*.

The Marquis, being owner in fee simple of the *Donnington Park* estate, contracted to sell it to Mr. *Charles Abney Hastings*, reserving to himself a life estate, without impeachment of waste. After this contract was entered into, but before it was completed, the Marquis cut down some ornamental timber on the estate. Mr. *Hastings* now brought in a claim against the estate of the Marquis for damages in respect of such waste. It was in evidence that the trees were cut *bonâ fide* by the Marquis (under the advice of a gentleman of the name of *Thomas*, an eminent landscape gardener), the Marquis believing that by so doing he improved the property; and, also, that Mr. *Hastings*, the present complainant, was aware of the felling of the trees during the whole time that it was taking place, and never made any complaint or remonstrance, but acquiesed in the act which he now called damage. The Chief Clerk was of opinion that no damage to the reversion was proved, and dismissed the claim, which was thereupon adjourned into Court for adjudication.

Mr. *Chapman Barber*, and Mr. *Dauney*, for the claimant:—

The Chief Clerk was of opinion that no damage to the reversion was proved; but the reversioner is entitled to have ornamental trees preserved to him, unless they would be injurious to the estate: *Campbell* v. *Allgood* (1); *Turner* v. *Wright* (2); *Wombwell* v. *Bellasyse* (3); *Marquis of Downshire* v. *Lady Sandys* (4).

(1) 17 Beav. 623.
(2) Joh. 740; 2 D. F. & J. 234.
(3) 6 Ves. 110 a, 2nd Ed. 1827.
(4) Ibid. 107.

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Sir *R. Baggallay*, Q.C., Mr. *Jessel*, Q.C., Mr. *Charles Hall*, an Mr. *Pemberton*, for the parties to the suit, were not called upon.

LORD ROMILLY, M.R., said that it appeared to him that the la on the subject had been totally misunderstood. The case had bee argued as if the reversioner were here asking for an injunction t restrain the tenant for life from cutting down ornamental timber and unquestionably it was true that the Court would interfere t prevent the cutting down of trees planted for ornament, eve although such trees might be (in the opinion of most persons) c the most absurd and fantastic shape, and rather a deformity tha an ornament. But when the trees were cut down the questio was, what damages could a jury reasonably award to the rever sioner for the injury done to the inheritance? It was this questio which he was now called on to answer; and before finally givin his decision on it, he would read through the evidence.

July 29. LORD ROMILLY, M.R., after referring to the fact above stated, said that the question he had to determine was, no at what amount the reversioner might value the damage whic had been occasioned to him, but at what amount twelve jurymen would value it: that he, performing the office of a jury, had com to the conclusion that no damage had been done; and, conse quently, that the claim must be dismissed with costs.

Solicitors: Messrs. *Austen, De Gex, & Harding;* Messrs. *Barlow Bowling, & Williams;* Messrs. *Blake & Harris.*

In re BOYS.
EEDES *v.* BOYS.
Ex parte HOP PLANTERS COMPANY.

M. R.
1870
June 1, 2.

Promissory Note—Principal and Surety—Current Account—Security for Balance—Burden of Proof.

A promissory note given by principal and surety for a definite sum, and payable on a fixed day, is presumed to be given in consideration of an advance at the date of the note: and if the payee asserts, as against the surety, that the object of the note was to secure the payment of the balance of an account current between the principal and the payee, the burden of proof lies on the payee.

THIS was a claim by the liquidator of the *Hop Planters Company, Limited*, now in liquidation, to prove against the estate of *Sarah Boys;* the testatrix in the matter and cause, a joint and several promissory note of *Horace Boys* and the testatrix.

A statement of facts was agreed upon between the parties to the following effect:—

Previously to March, 1865, advances of money had been made by the company to *Horace Boys;* and the repayment of such advances, to the amount of £973 13*s.* 3*d.*, was secured by certain mortgages.

In March, 1865, *Horace Boys* and the testatrix, *Sarah Boys* (who was his aunt), as his surety, gave a joint and several promissory note to the *Hop Planters Company, Limited*, for £400, payable eight months after date.

This note was not paid at maturity, but on the 31st of March, 1866, *Horace Boys* and the testatrix, as his surety, gave another joint and several promissory note to the company for £500, payable eight months after date. It was the amount of the last-mentioned note, with interest from maturity, that was now claimed by the liquidator.

The £400 note was given up by the company to *Horace Boys* when the £500 note was given.

In April, 1869, *Horace Boys* executed a deed of arrangement

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with his creditors pursuant to the *Bankruptcy Amendment Act*, 1868.

Horace Boys had since died; and the only evidence as to the nature of the transaction, beyond what has been already stated, was derived from an account of the dealings between him and the company, which had been made use of by the company in support of a claim made on their behalf under the deed of arrangement. It appeared from this account that various dealings had taken place between *Horace Boys* and the company, or their predecessors in business, commencing in the year 1856. *Horace Boys* sent to the company parcels of hops for sale, and in the account he was credited with the amount of the proceeds of sale. He also received from the company cash advances, the repayment of which was generally secured by his own acceptance for the amount; and in the account he was debited with the cash advance, and credited with the amount of his acceptance. In the account *Horace Boys* was debited with an advance of £200 on the 31st of March, 1866, and with £300 on the 6th of April following; he was not credited with anything in respect of the promissory note, to which no reference was made in the account. The account was continued down to the 19th of July, 1869, and on the whole a balance of £1169 3*s.* 6*d.* was claimed as due to the company, which amount was partly secured by the mortgages already mentioned. The items entered on the credit side of the account, subsequently to the 6th of April, 1866, amounted to more than was sufficient to satisfy all that was due from *Horace Boys* to the company on that day.

Mr. *Lindley*, for the liquidator:—

Neither the note, nor the £500 secured by it, appear as items in the account, consequently the doctrine of *Clayton's Case* (1) does not apply. It is for the other side to prove that the note has been paid, and the entries in the account do not prove payment: *Henniker* v. *Wigg* (2). The company were not bound to appropriate to the payment of the note any sum received from *Horace Boys* subsequently to the time when the note was made or became due, unless he directed them to do so: *Williams* v. *Rawlinson* (3).

(1) 1 Mer. 585. (2) 4 Q. B. 792.
(3) 3 Bing. 71.

Mr. *Wickens*, for the executor of the testatrix :—

Although no single sum of £500 appears in the account, yet two sums of £200 and £300 are entered as having been paid to *Horace Boys* at about the time when the note was given. The presumption is, that the note was given to secure an existing debt; at all events, this is the presumption in the absence of any evidence that the purpose of the note was explained to the surety: *Walker* v. *Hardman* (1). If so, the note must be treated as paid, in accordance with the doctrine laid down in *Clayton's Case* (2); *Pennell* v. *Deffell* (3); *Merriman* v. *Ward* (4); *Hammersley* v. *Knowlys* (5).

Mr. *Lindley*, in reply.

June 2. LORD ROMILLY, M.R. :—

I am of opinion that this claim fails.

The testatrix, as surety, joined with her nephew in giving to the *Hop Planters Company* a joint and several promissory note for £500. The note was dated on the 31st of March, 1866; it was payable in eight months, namely, on the 30th of November, 1866. The official liquidator seeks to prove for this against the estate of the testatrix, the nephew being bankrupt, and more than this sum being due from him on his account current. The defence is that, under the rule laid down in *Clayton's Case*, the account was paid off by sums received by the company. The real question is, whether the note was given as a security for money then due, or to be advanced by the company to the nephew, or whether it was intended to be a continuing security to meet the running balance from time to time that might be due on the account of the nephew. This really is a question of evidence. *Primâ facie*, the note would appear to be for the purpose of securing an advance to be made to the nephew from the company, or a balance then due from him, and, to establish the contrary, evidence is required; and I think that the burden of proof should lie upon those who seek to establish that it was intended to be a running security for the balance

(1) 11 Bli. (N.S.) 229.
(2) 1 Mer. 585.
(3) 4 D. M. & G. 372.
(4) 1 J. & H. 371.
(5) 2 Esp. 636.

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of the account from time to time. In my opinion, assuming the evidence to consist solely of the statement laid before me, and the accounts which are given, it seems to be in favour of the note being a security for the advance then made to him. In the first place, it is to be observed that the promissory note is not payable on demand. If it was given to secure the balance of a current account you would expect it to be payable when the account was closed, or at the period when they thought fit to say they would not advance any more money. But it is payable at eight months certain, which is like a bill. Then, in the second place (what I think is still more important), it appears that, on the very day of the note being given, there was an advance of £200 made by the company to the nephew, which is followed six days afterwards by another advance of £300, making exactly the amount of £500. There is nothing to explain this. They required the testatrix to become jointly and severally liable for the promissory note, and that is all; and, in my opinion, their object was that they should have her security for his repayment of the money which they advanced him.

The cases cited do not appear to me to affect the question. The one which was most relied upon was the case of *Henniker* v. *Wigg* (1); and there were several others, such as *Williams* v. *Rawlinson* (2). But, in my opinion, they all amount to this: that there must be evidence of some sort or other to shew that a security purporting to be for a definite sum was given to meet the balance of a current account. In *Henniker* v. *Wigg* it was assumed that, in an ordinary case, the security would be merely for the money advanced; but in that case the Court was of opinion, upon the inferences to be drawn from the language, and from the conduct of the parties after the execution of the bond, that it was intended that the bond should stand as a continuing security; and that being so, the rule in *Clayton's Case* (3) did not apply. In my opinion, the inferences here are exactly the other way, and therefore the claim fails.

Solicitors: Messrs. *Stevens, Wilkinson, & Harries;* Messrs. *Tompson, Pickering, & Styan.*

(1) 4 Q. B. 792. (2) 3 Bing. 71.
(3) 1 Mer. 585.

HITCHEN *v.* BIRKS.

M. R.
1870
July 4, 5, 7.

Receiver pendente Lite—Real and Personal Estate—Administrator—Jurisdiction—Probate Act, 1857 (20 & 21 *Vict.* c. 77), ss. 70, 71—*Practice—Partial Demurrer without Answer.*

Upon the death of a person intestate, two persons, claiming to be coheiresses-at-law and sole next of kin of the intestate, entered into possession of the intestate's real estate, and obtained a grant of letters of administration of the personal estate. The Plaintiff, who claimed to be heir-at-law and one of the next of kin of the intestate, commenced proceedings in ejectment for the recovery of the real estate, and also took proceedings in the Probate Court for a recall of the letters of administration, and then filed a bill for the appointment of a receiver pending the litigation. One of the coheiresses demurred to the whole bill; the other demurred, without answering, to so much of the bill as sought relief in respect of the real estate:—

Held, that both demurrers were good: the partial demurrer, because the Court has no jurisdiction to appoint a receiver in a simple case of contested heirship; and the demurrer to the whole bill, on the ground that where administration has been granted the Court will not exercise its jurisdiction to appoint a receiver of personal estate, unless a special case is made—a rule which will be strictly enforced, since the *Probate Act* of 1857 (20 & 21 Vict. c. 77), enables the Court of Probate to appoint an administrator *pendente lite*, with powers similar to those of a receiver.

Since the passing of the *Chancery Improvement Act* (15 & 16 Vict. c. 86) a Defendant may demur to part of a bill without answering the rest.

THE Plaintiff claimed to be heir-at-law and one of the next of kin of one *Mary Adams*, who died in October, 1869, having made a will which became inoperative by reason of the death of the legatees, devisees, and executors in her lifetime. She was entitled to personal estate estimated at the value of not less than £30,000, and to real estate of very considerable value, including thirty or forty houses or cottages let to weekly tenants, and nine or ten pieces of land let to different tenants at rents not exceeding £25 each. Upon her death the Defendants, *Lucy Eardley* (the wife of the Defendant *Joseph Eardley*) and *Louisa Birks*, claiming to be (but, as the bill alleged, not in fact being) the coheiresses-at-law and the sole next of kin of *Mary Adams*, entered into possession and receipt of the rents and profits of all her real estates; and also, on the 27th of January, 1870, procured letters of administration of her personal estate to be granted to themselves, under which they

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had got in and collected part of such estate. The Plaintiff had commenced, and (as he alleged) intended strenuously to prosecute, proceedings in ejectment for the recovery of the real estate, and proceedings in the Probate Court for the recall of the letters of administration. On the 1st of June he filed the bill in this suit against *Louisa Birks*, *Joseph Eardley*, and *Lucy*, his wife, and certain other persons who were alleged to be next of kin of *Mary Adams*. The bill contained a statement of the Plaintiff's pedigree, and allegations of which the effect is stated above; and it also alleged as follows:—

"Some time must necessarily elapse before the proceedings at law and in the Court of Probate can be determined; and in order to protect the real estate, which consists principally of houses and other property liable to deterioration in value and requiring repairs, and to prevent the personal estate from being wasted and lost, it is absolutely essential that a receiver of the real and personal estate of the said testatrix should be appointed. In fact, until the disputed title has been determined, several of the tenants refuse to pay their rents either to the Plaintiff or to the Defendants, *Louisa Birks* and *Joseph Eardley*, and *Lucy*, his wife; and unless a receiver is appointed such rents will, in many cases, be entirely lost. The Plaintiff has served most of the tenants with notices requiring them to pay their rents to him.

"The Defendants, *Louisa Birks*, *Joseph Eardley*, and *Lucy Eardley*, notwithstanding that they have notice of the aforesaid claims, threaten and intend to continue to receive and to enforce payment of the rents and profits of the real and leasehold estate of the said testatrix, and to let, sell, dispose of, and otherwise deal with the same for their own benefit, and also to call in, convert, receive, and deal with her personal estate, or such parts thereof as they have not already got in and realized. In the event of the proceedings at law and in ejectment proving successful, there is not the slightest prospect of recovering from the said Defendants, or any of them, any portion of the rents, profits, and other moneys which they may receive under cover of their pretended title. The said Defendants are persons in a humble position of life, who have not been accustomed to the state of affluence in which they now unexpectedly find themselves placed."

The bill prayed for the appointment of a receiver of the rents and profits of the real estate pending the proceedings at law, and for the appointment of a receiver of the personal estate pending the proceedings in the Probate Court, and for the delivery up to such receiver, or the deposit in Court, of the title-deeds and documents relating to the real and personal estate.

The Defendants, *Joseph Eardley* and *Lucy*, his wife, demurred to so much of the bill as sought relief with respect to the real estate. No interrogatories had been filed, and this demurrer was filed after the time for filing them had expired.

The Defendant, *Louisa Birks*, demurred to the whole bill.

Mr. *Jessel*, Q.C., and Mr. *Batten*, for the demurrers:—

First, as to the partial demurrer. It is now well settled that this Court has no jurisdiction to appoint a receiver of real estate, pending a contest between persons claiming under adverse legal titles: *Jones* v. *Jones* (1); *Earl Talbot* v. *Hope Scott* (2); *Campbell* v. *Campbell* (3); *Carrow* v. *Ferrior* (4). Although, under the old practice, a Defendant could not demur to part of a bill without answering the rest, that has been altered by the *Chancery Improvement Act*: *Burton* v. *Robertson* (5).

Next, as to the demurrer to the whole bill. We admit that the Court has jurisdiction to appoint a receiver of personal estate in a proper case, but we submit that this bill does not make out a sufficient case. It was laid down by Vice-Chancellor *Wigram*, in *Rendall* v. *Rendall* (6), that a receiver will not be appointed where administration has been granted, unless a special case is made; for example, fraud must be charged against the administrator; or he must be insolvent: *Ball* v. *Oliver* (7); *Jones* v. *Frost* (8); *Devey* v. *Thornton* (9); *Connor* v. *Connor* (10). The Court will enforce this rule all the more strictly that now the Court of Probate can protect the property by appointing an administrator *pendente lite*, 20 & 21 Vict. c. 77, ss. 70, 71: *Veret* v. *Duprez* (11).

(1) 3 Mer. 161.
(2) 4 K. & J. 96.
(3) 4 Macq. 711.
(4) Law Rep. 3 Ch. 719.
(5) 1 J. & H. 38.
(6) 1 Hare, 152.
(7) 2 V. & B. 96.
(8) Jac. 466.
(9) 9 Hare, 222.
(10) 15 Sim. 598.
(11) Law Rep. 6 Eq. 329.

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Mr. *Southgate*, Q.C., and Mr. *W. Barber*, for the Plaintiff:—

There is nothing in the *Probate Act* to take away the jurisdiction of the Court of Chancery. *Veret* v. *Duprez* (1) was not decided on demurrer but on motion. The bill alleges that the property is in danger, and that the Plaintiff is taking steps to assert his rights; that is sufficient to entitle him to a receiver both of real and personal estate: *Watkins* v. *Brent* (2): *Newton* v. *Ricketts* (3); *Dimes* v. *Steinberg* (4). In *Williams* v. *Attorney-General* (5), a receiver was appointed of real and personal estate, under circumstances very similar to the present.

[The MASTER OF THE ROLLS:—That case related to the property of Mrs. *Emsley*, who was murdered at *Stepney;* and there was no one in possession.]

Then the partial demurrer is irregular. The only authority in support of it is *Burton* v. *Robertson* (6), which was a surprise on the profession.

[They referred, on this point, to *Rowe* v. *Tonkin* (7).]

July 7. LORD ROMILLY, M.R:—

The more I look at this case the more I feel clear that I must allow the partial demurrer. I felt doubtful at first whether a Defendant could demur to part of a bill without answering the rest; but the present Lord Chancellor has decided, in *Burton* v. *Robertson*, that since the passing of the *Chancery Improvement Act* a Defendant may do so; he gives very good reasons for his decision, and I shall follow it. That being so, the case, so far as it relates to the real estate, is merely one of contested heirship, in which I have no jurisdiction; and I therefore allow the partial demurrer.

I also allow the second demurrer, because I think no sufficient case is stated for the interference of this Court. The Court, under

(1) Law Rep. 6 Eq. 329.
(2) 1 My. & Cr. 97.
(3) 10 Beav. 525.
(4) 2 Sm. & Giff. 75.
(5) *Seton* on Decrees, p. 1003. The bill is given at length in the Forms to *Daniell's* Chancery Practice, p. 2073.
(6) 1 J. & H. 38.
(7) Law Rep. 1 Eq. 9.

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the old law, always required a special case to be made out for the appointment of a receiver where an administrator had been appointed, and I think that it ought to insist on this more strictly than ever, now that the Court of Probate has power to protect the property during litigation. It was clearly the intention of the framers of the *Probate Act* that the Probate Court should have power to decide itself the whole matter in dispute, and that the parties should not be put to the expense of a second suit in this Court. I do not mean to say that the jurisdiction of this Court is put an end to by the *Probate Act;* but a stronger case for the appointment of a receiver must be made out than was required before. Here no such case is made out, and it is not even alleged that the Defendants are insolvent. I therefore allow both demurrers.

Solicitors: Messrs. *Wedlake & Letts;* Messrs. *Mackenzie, Trinder, & Co.*

MORGAN *v.* MALLESON.

M. R.
1870
July 26, 28.

Voluntary Gift—Memorandum of Transfer of Bond—Non-delivery—Implied Declaration of Trust.

A memorandum of a voluntary gift in this form, "I hereby give and make over to *M.* an *India* bond, value £1000," was signed by *S.*, and given by him to *M.*, without handing over the bond. *S.* died, and the residuary legatees under his will claimed the bond:—

Held, that the memorandum was a good declaration of trust in favour of *M.*, and that he was entitled to the bond.

THE following memorandum was given by *John Saunders*, the testator in the cause, to his medical attendant, Dr. *Morris*:—

"I hereby give and make over to Dr. *Morris* an *India* bond, No. D., 506, value £1000, as some token for all his very kind attention to me during illness.

"Witness my hand, this 1st day of August, 1868.

"(Signed) *John Saunders.*"

The signature was attested by two witnesses, and the memorandum was handed over to Dr. *Morris*, but the bond, which was

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transferable by delivery, remained in the possession of *Saunders*. There was no consideration for it.

Saunders died more than a year afterwards, having by his will bequeathed the residue of his personal estate to charities. A suit was instituted for the administration of his estate, and a summons was taken out by the Attorney-General on behalf of absent charities for the direction of the Court on the question whether this memorandum was or was not a valid declaration of trust in favour of Dr. *Morris*.

Mr. *Wickens*, for the Attorney-General, contended, on behalf of the absent charities, that this memorandum, which was a document of an informal nature given by *Saunders* to his medical attendant, and without consideration, could not be taken to be an assignment or a declaration of trust when there had been no delivery of the bond: *Ex parte Pye* (1); *Meek* v. *Kettlewell* (2); *Dillon* v. *Coppin* (3); *Antrobus* v. *Smith* (4); *Edwards* v. *Jones* (5).

Mr. *Jessel*, Q.C., and Mr. *Speed*, for Dr. *Morris*, contended that the memorandum was a good declaration of trust, and that Dr. *Morris* was entitled to the bond: *Kekewich* v. *Manning* (6); *Richardson* v. *Richardson* (7); *Parnell* v. *Hingston* (8).

July 28. LORD ROMILLY, M.R.:—

I am of opinion that the paper-writing signed by *Saunders* is equivalent to a declaration of trust in favour of Dr. *Morris*. If he had said, "I undertake to hold the bond for you," or if he had said, "I hereby give and make over the bond in the hands of *A.*," that would have been a declaration of trust, though there had been no delivery. This amounts to the same thing; and Dr. *Morris* is entitled to the bond, and to all interest accrued due thereon.

Solicitors for the Attorney-General: Messrs. *Raven & Bradley*.
Solicitors for Dr. *Morris*: Messrs. *Tucker & Lake*.

(1) 18 Ves. 140.
(2) 1 Hare, 464.
(3) 4 My. & Cr. 647.
(4) 12 Ves. 39.
(5) 1 My. & Cr. 226.
(6) 1 D. M. & G. 176.
(7) Law Rep. 3 Eq. 686.
(8) 3 Sm. & Giff. 337.

TAYLOR *v.* TAYLOR.

M. R.
1870
July 26.

Joint Stock Company—Executors of Deceased Shareholder—Payment of Legacy —Subsequent Winding-up—Liability for Calls.

The executors of a shareholder in a joint stock company, which was a going concern at the time of the testator's death, paid a legacy under his will without providing for any contingent liability in respect of the shares which they retained unsold. The company was subsequently wound up, and the executors were placed on the list of contributories:—

Held, that they were liable to pay the amount of the legacy in satisfaction of calls.

THE question in this case was, whether the executors of a deceased shareholder in the *Leeds Banking Company*, which was wound up after the testator's death and the distribution of his assets, were liable to pay, in satisfaction of calls, a sum which they had already paid to a legatee under the testator's will.

Robert Webster, the testator in the cause, was at the time of his death possessed of twenty shares in the *Leeds Banking Company*. He bequeathed by his will a legacy of £200 to *Elizabeth Taylor*. The testator died in March, 1863, and his debts and the said legacy were paid by the executors without setting aside any sum to answer contingent liabilities, the banking company being then a going concern.

The banking company subsequently stopped payment, and was ordered to be wound up. The shares belonging to the testator had not been disposed of, and the executors were placed on the list of contributories; but the testator's estate was insufficient to pay the calls.

The official liquidator now applied for an order against the executors, making them liable to pay in discharge of calls the sum of £200, which they had already paid to the legatee.

Mr. *Southgate*, Q.C., and Mr. *Kekewich*, for the official liquidator, contended that the executors were not justified in paying the legacy without setting apart a sufficient sum to meet the contingent liability attaching to the shares, and that the payment could

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not be allowed. They referred to *Norman* v. *Baldry* (1); *Governor of Chelsea Waterworks* v. *Cowper* (2); and *Knatchbull* v. *Fearnhead* (3).

Mr. *Jessel*, Q.C., Mr. *G. N. Colt*, and Mr. *Phear*, for the executors:—

The payment of this legacy ought to be allowed. The liability was only contingent, for the bank was a going concern at the time of the testator's death, and an executor cannot be called on to keep his testator's assets for the purpose of paying a contingent debt: *King* v. *Malcott* (4); *Dean* v. *Allen* (5); *Dodson* v. *Sammel* (6); *Wentworth* v. *Chevill* (7).

Besides, if the Court had been called upon to administer the estate of the testator, with a knowledge of the facts, it would have sanctioned the payment of the legacy. The executors cannot, therefore, be made liable for doing that which, if they had been acting under the direction of the Court, they would have been bound to do.

LORD ROMILLY, M.R., said that this was a similar case to *Knatchbull* v. *Fearnhead*. The executors had committed a breach of trust in paying the legacy without providing for the liability attaching to the testator's estate at the time of his death in respect of these shares. The amount must be paid to the official liquidator.

Solicitors for the Official Liquidator: Messrs. *Freshfield*.

Solicitors for the Executors: Messrs. *Prior & Bigg*, agents for Mr. *H. Bramley, Sheffield*.

(1) 6 Sim. 621.
(2) 1 Esp. 275.
(3) 3 My. & Cr. 122.
(4) 9 Hare, 692.
(5) 20 Beav. 1.
(6) 1 Dr. & Sm. 575.
(7) 26 L. J. (Ch.) 760.

In re CONSOLS INSURANCE ASSOCIATION.

M. R.
1870
July 28.

GLANVILLE'S CASE.

Winding-up Act, 1848—*Contributory—Transferor and Transferee—Transfer subsequent to Presentation of Petition.*

Where shares in a company have been transferred in the interval between the presentation of a Petition for winding up the company under the *Joint Stock Companies Winding-up Act*, 1848, and the date of the order, the transferor, and not the transferee, is the proper person to be settled on the list of contributories in respect of the shares.

ON the 16th of January, 1862, a Petition was presented, under the *Joint Stock Companies Winding-up Acts*, 1848, 1849, and 1857, for the winding up of the *Consols Insurance Association*. On the 28th of June, 1862, an order was made on this Petition, by which it was ordered that the *Consols Assurance Association* be absolutely dissolved as from the 28th of June, 1862, and be wound up under the provisions of the said Acts.

At the time of the presentation of the Petition, *John Glanville* was the holder of fifty shares in the company. On the 29th of January he transferred his shares to one *John Daily*, and such transfer was duly registered in accordance with the regulations of the company, and *John Daily's* name was entered on the register of shareholders.

The official manager now sought to have Mr. *Glanville's* name placed on the list of contributories. The question turned on the meaning of the word "contributory," as used in the said Acts.

By sect. 3 of the *Joint Stock Companies Winding-up Act*, 1848 (11 & 12 Vict. c. 45), it is enacted, amongst other things, as follows:—

"The word 'company' shall mean any partnership, association, or company, corporate or unincorporate, to which this Act applies.

"The word 'member' shall mean any person entitled to a share of the assets or accruing profits of any such company at the time of presenting the Petition for dissolving the same, or winding up the affairs thereof under this Act.

"The word 'contributory' shall include every member of a

M. R. 1870 GLANVILLE'S CASE.

company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or administrator of a deceased member, or as a former member of the same, or as heir, devisee, executor, or administrator of a former member of the same, deceased, or otherwise howsoever."

Mr. *Jessel*, Q.C., and Mr. *Charles Hall*, for the official manager:—

It is quite plain, on the construction of the Act of 1848, that *Glanville* is a contributory. The word "contributory" is to include every "member" of the company; and a member of the company is defined to be a person entitled to a share at the time of presenting the Petition.

Sir *R. Baggallay*, Q.C., and Mr. *Lindley*, for *Glanville*:—

The point raised by the official manager appears now to be raised for the first time; and the contention on his behalf is opposed to the practice which has uniformly prevailed in winding up companies under the Acts in question. That practice has always been to place on the list of contributories those persons who were members at the date of the dissolution of the company. The enactment as to the meaning of the word "contributory" must be construed as providing, not that every member shall be a contributory, but only every member who is liable to contribute to the payment of the debts, liabilities, or losses of the company. This construction is a reasonable one, when it is borne in mind that an order for winding up under these Acts was simply a substitute for a decree directing a dissolution of partnership, and consequently only determines the rights of the member *inter se*, and is not for the benefit of creditors, as a winding-up under the Act of 1862 would be. It is clearly established that, as between the transferor and transferee of shares, the latter is the contributory: *Cape's Executors' Case* (1); *Mayhew's Case* (2). In *Grisewood's Case* and *De Pass's Case* (3) the transferors of the shares were the holders at the time when the Petition was presented; and if the official manager's contention were correct it would have been wholly

(1) 2 D. M. & G. 562. (2) 5 Ibid. 837.
(3) 4 De G. & J. 544.

unnecessary to raise the question—so much contested in these cases—as to whether a transfer to escape liability was good.

Mr. *E. S. Ford*, for the creditors' representative.

LORD ROMILLY, M.R.:—

I think that the Act of Parliament is too distinct to be got over. The scope and object of the Act was to prevent, by legislative enactment, persons escaping from their obligations to a company which they knew to be in a failing way. It is obvious that this was a very desirable thing to be prevented. Accordingly, nothing was more easy than to prevent such transfers from being valid; and the mode in which it was done was to say that all the members should be contributories, and that the members should be taken to mean the persons entitled to any share of the assets at the time when the Petition to wind up the company was presented. If the object of the Legislature was to make all persons who might transfer their shares, after the presentation of the Petition, liable as contributories, but at the same time to allow the transfer to be valid without exonerating the transferor from his liability, so that the company might go on and perform valid acts in the interval, I do not see how the object could have been better attained than by the enactment in the 3rd section of the Act; and I must say that I think it is a very desirable and a very useful enactment. It may be that, if the point had been taken, it would have avoided many of the questions raised in *De Pass's Case* (1); and that it would have been unnecessary to decide that which shocked both the Lord Chancellor *Campbell* and myself so much, namely, that you should allow a person who knew a company was in a failing condition, and going to be ruined immediately, to get rid of his liability to pay the creditors of the company by transferring his shares to a mere pauper. That appeared to me a gross fraud according to the rules of equity administered in the Court of Chancery. But, be that as it may, this section of the Act appears to me to conclude the matter; and I am of opinion that the person who is a member of the company at the time when the Petition is presented is liable as a contributory, without prejudice to his right

(1) 4 De G. & J. 544.

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to get over against the persons to whom he has sold his shares indemnity for anything he has paid or may have to pay in respect of the company.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Messrs. *Burton, Yeates, & Hart;* Messrs. *Merriman & Pike.*

M. R. 1870 *Jan.* 27; *Feb.* 9.

BOYD *v.* PETRIE.

Mortgage—Power of Sale—Transfer—Extinction of Power.

In 1825 real estate was mortgaged for £27,000, to be repaid with interest twelve months after the date of the mortgage; and the mortgage-deed contained a power of sale exerciseable in case of default in payment. In 1830, default having been made, the mortgage debt was transferred. The deed of transfer contained a recital that the power of sale had not been and was not intended to be exercised; an assignment of the mortgage debt "and all powers and remedies for recovering the same;" a conveyance of the mortgaged property freed from the old proviso for redemption, and subject to a new one, by which the mortgage debt was to be repaid, with interest, at the expiration of seven years from the date of the mortgage; covenants for the payment of the principal at the expiration of seven years, and of interest half-yearly in the meantime; and a power of sale exerciseable in default of payment of principal or interest; and it was also thereby agreed that the mortgage debt should remain on the security of the mortgage for seven years, unless the mortgagor should die or make default in the payment of interest in the meantime:—

Held, that the power of sale in the deed of 1825 was absolutely extinguished by the deed of transfer, and not merely suspended for seven years.

Reversed by L. J. 12 Ch. 388.

PREVIOUSLY to the 15th of June, 1825, *Robert Foster Grant* (who shortly after that date assumed the surname of *Dalton*), was entitled in fee to two estates in *Norfolk*, called the *Ingoldsthorpe* estate and the *Snettisham* estate, subject, as to the *Ingoldsthorpe* estate, to a mortgage for £15,000, created in January, 1785, and as to the *Snettisham* estate, to a charge for £3300. By a deed dated the 15th of June, 1825 (to which the owners of the £3300 charge were parties), the *Ingoldsthorpe* and *Snettisham* estates were conveyed to *Christopher Ingram* in fee, subject, as to the *Ingoldsthorpe* estate, to the mortgage of January, 1785, and as to both estates to a proviso for redemption on payment, by *Robert Foster Grant*, his

heirs, executors, administrators, or assigns, of the sum of £27,000, with interest at 5 per cent., on the 15th of June, 1826. The same deed contained the usual covenants by *Robert Foster Grant* for payment of the principal on the 15th of June, 1826, and of interest in the meantime on the days therein mentioned; and also a power of sale exerciseable in case default should be made in payment of the interest on the £27,000 for one month or upwards after any of the days therein appointed for payment thereof, or default should be made in payment of the principal sum of £27,000 on the day appointed for payment thereof; and in the latter case the power was to be exerciseable, although no advantage had been taken of any previous default.

Default was made in payment of the principal on the 15th of June, 1826; but interest was regularly paid down to the 2nd of July, 1830.

In 1827, £3000, part of the mortgage debt of £15,000, to which the *Ingoldsthorpe* estate was subject, became vested in *Christopher Ingram.*

An indenture, dated the 2nd of July, 1830, was made between *Christopher Ingram* of the first part, *Robert Foster Grant Dalton* of the second part, and *William Key* and *Edward Richardson* of the third part. This deed contained a recital of the mortgage of the 15th of June, 1825, which concluded as follows: "And in the said now reciting indenture a power or trust for sale is also contained for the better securing of the said principal sum and interest, but the said power has not been and is not intended to be exercised." It also contained a recital that the two sums of £3000 and £27,000 remained due to *Christopher Ingram,* but all interest had been paid up to the date thereof; and it was thereby witnessed that, in consideration of £30,000 paid to *Ingram* by *Key* and *Richardson, Ingram,* at the request of *Dalton,* granted and assigned, and *Dalton* confirmed, unto *Key* and *Richardson,* their heirs, executors, administrators, and assigns, the two sums of £3000 and £27,000, "and all powers and remedies for recovering the same sums respectively, and all benefit of the said several indentures of mortgage, and of every covenant and security therein respectively contained." The deed then contained a conveyance of the two estates free from the proviso for redemption contained in the mortgage of June, 1825,

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but subject to the mortgage of 1785, and the principal sum and interest thereby secured, and also to a proviso for redemption if *Dalton*, his executors, administrators, and assigns should pay to *Key* and *Richardson* the sum of £30,000 on the 2nd of July, 1837 (subject as thereinafter mentioned), and should on the 2nd of January and the 2nd of July in every year in the meantime pay interest thereon at 5 per cent.; and it was thereby agreed between *Dalton*, *Key* and *Richardson* that the principal sum of £30,000 should remain on the security thereof for seven years from the date thereof, and that without any right in *Dalton*, his heirs, executors, administrators, or assigns, to redeem the mortgaged property, or to pay off all or any part of the principal sum of £30,000 during the said term of seven years without the consent of *Key* and *Richardson*, or the survivor of them, his executors, administrators, or assigns, to accept the same, and also without any right in *Key* and *Richardson*, or the survivor of them, his executors, administrators, and assigns to foreclose the equity of redemption of the said hereditaments and premises, or to compel the payment of the said principal sum of £30,000, or any part thereof, during the said term of seven years, subject nevertheless to a proviso, that if default should be made in payment of the interest of the said principal sum, or some part thereof, by the space of three calendar months next after any one or more of the said half-yearly days of payment thereof, or if *Dalton* should depart this life during the said term of seven years, then, and in either of the said events, and notwithstanding anything therein contained to the contrary, it should be lawful for *Key* and *Richardson*, or the survivor of them, his executors, administrators, and assigns, if he or they shall so think fit, and should signify the same by writing, to call in and demand payment of the said principal money and interest within the said term of seven years, in like manner as if the said term of seven years had expired by lapse of time. The deed contained covenants by *Dalton* for payment of £30,000 on the 2nd of July, 1837, and of interest in the meantime; and a power of sale exerciseable if default should be made in payment of the £30,000, or the interest thereof, or any part thereof, contrary to the proviso or agreement for redemption thereinbefore contained.

In the interval between 1825 and 1830, *Robert Foster Grant*

Dalton had created fresh incumbrances on the estates; he also incumbered the estates subsequently to the last-mentioned date, and ultimately died insolvent.

The mortgaged property was sold in lots by persons claiming under *Key* and *Richardson*, who proposed to make a title to the purchasers under the power of sale in the mortgage of 1825; but the purchasers took the objection that that power was extinguished by the deed of 1830; and they refused to complete unless the owners of the incumbrances created previously to the 2nd of July, 1830, concurred. These incumbrancers declined to concur in the sale; and thereupon the bill was filed by the persons entitled to the mortgage debts of £27,000 and £3000 against the other incumbrancers on the *Ingoldsthorpe* and *Snettisham* estates, praying that the power of sale contained in the indenture of the 15th of June, 1825, might be declared to be valid and subsisting, and that the sales made by the Plaintiffs might be carried into effect; or otherwise for foreclosure.

None of the purchasers were made parties to the suit; but at the hearing one of them appeared and consented to be bound, as if he had been made a Defendant to the bill.

There was some dispute as to whether the Plaintiffs were entitled to priority over the other incumbrancers in respect of their charges; but it was agreed that the question as to the power of sale should be first argued and determined.

Sir *R. Baggallay*, Q.C., and Mr. *Charles Parke*, for the Plaintiffs:—

We submit that the power of sale contained in the deed of 1825 was not extinguished by the deed of 1830, but that the exercise of it was merely suspended for a period of seven years from the 2nd of July, 1830.

The deed of 1830 contains an assignment of all powers and remedies for recovering the debt of £27,000; why was that inserted, if not for the purpose of keeping up the powers in the original mortgage-deed? The recital must be construed in accordance with the general intention of the parties, as disclosed by the whole deed: *Young* v. *Smith* (1); *In re Strand Music Hall*

(1) Law Rep. 1 Eq. 180.

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Company (1); it means simply that it was not the intention of the parties to exercise the power *modo et formâ*, as it stood in the deed of 1825. *Phillips* v. *Gutteridge* (2) supports our contention.

Mr. *Southgate*, Q.C., [Mr. *Kenyon*, Q.C., Mr. *Nalder*, and Mr. *Haynes*, for Defendants in the same interest as the Plaintiffs.

Mr. *Batten*, for a purchaser.

Mr. *Bristowe*, Q.C., Mr. *Jessel*, Q.C., Mr. *Phear*, and Mr. *Chapman Barber*, for incumbrancers prior to the 2nd of July, 1830:—

First, we say that, in point of form, the Plaintiffs are wrong. If their present contention be correct they can obtain no relief in this suit; and the Court will not make a declaration unless relief consequential thereon can be given.

Next, we say that the power of sale in the deed of 1825 has been extinguished. This is an equitable power; and the whole question is, what was the intention of the parties? Here the parties have declared what their intention was; and there is no need to go into any of those difficult questions which sometimes arise where the intention is not expressed, but only to be gathered from the frame of the deed.

It is said that the right to exercise the power of sale passed by the general words in the assignment, but the effect of these general words is cut down by the recital: *Moore* v. *Magrath* (3); *Walsh* v. *Trevannion* (4).

But even if the recital had not been inserted in the deed, we say that the frame of the deed shews a clear intention to put an end to the old mortgage and create a new one: *Curling* v. *Shuttleworth* (5); *Young* v. *Roberts* (6).

Mr. *Hinde Palmer*, Q.C., Mr. *Schomberg*, Q.C., Mr. *Springall Thompson*, Mr. *Macnaghten*, and Mr. *Hance*, for other parties.

Sir *R. Baggallay*, in reply.

(1) 35 Beav. 153.
(2) 4 De G. & J. 531.
(3) Cowp. 9.
(4) 16 Sim. 178.
(5) 6 Bing. 121.
(6) 15 Beav. 558.

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Feb. 9. LORD ROMILLY, M.R., after stating the facts, continued:—

I am of opinion that the power of sale contained in the deed of 1825 is no longer subsisting, and that the effect of the deed of July, 1830, is entirely to abrogate the power of proceeding under it. This is a mere question of intention. If the power is subsisting, it could be enforced at once; but by the deed of July, 1830, it is expressly covenanted that no steps should be taken to enforce payment of the money before July, 1837, unless *Dalton* should die previously. But what is conclusive is the recital I have read, that by the parties to the deed the power of sale was not intended to be exercised. Great reliance is placed by the counsel for the Plaintiffs on the general words; but they are overpowered by the unambiguous expression of intention in the other parts of the deed. Thus the deed assigns over all the covenants and remedies contained in the deed of 1825, but these are controlled by the covenant not to enforce payment for seven years. It is not a case where the two parts of the deed are in direct conflict, but where the general effect and meaning of the deed is clear, which is, that the power of sale and previous covenants are merged in and overridden by the power of sale and covenants contained in the deed of July, 1830. I think it therefore unnecessary to go into the ulterior question respecting the form of the suit and the parties to it, as I am prepared to declare that the Plaintiffs had no power to sell under the power of sale in the deed of 1825; and as this declaration is in favour of the absent purchasers it may be made without their being present.

Solicitors: Messrs. *Parke & Pollock;* Messrs. *Coverdale & Co.;* Messrs. *Oliver;* Mr. *T. Gill,* jun.; Messrs. *Shoubridge;* Messrs. *Powell, Thompson, & Groom;* Messrs. *C. & J. Allen & Son.*

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May 29; *June* 3.

SPRINGETT *v.* JENINGS.

Will—Mortmain—Secret Trust—Devise void in Law—Residuary Gift—Wills Act (1 *Vict. c.* 26), *s.* 25.

8 Ch. D. 435

Testatrix, who had executed a deed of gift (which was enrolled) of lands at *H.* to three trustees for founding a charity, died within a year of its execution, having by her will devised the same lands, in case she should not in her lifetime have effectually disposed of them, to *A.*, *B.*, and *C.* (two of whom were trustees of the deed) as joint tenants, and she devised certain lands to the Plaintiff by the following description: "The rest of my hereditaments at *H.*, and all my hereditaments at *S.* and *W.*" The Plaintiff filed a bill impeaching the devise as being a secret trust for charitable purposes, and claiming to be entitled to the lands:—

Held, that as the evidence shewed that the testatrix devised the lands in full reliance that the devisees would carry out her object, and that the trust was tacitly accepted by them, the devise was therefore void:

Held, also, that the words "the rest of my lands at *H.*," were not a residuary devise within s. 25 of the *Wills Act* (1 Vict. c. 26), and that the lands in question were undisposed of.

THE object of this suit was to set aside a devise contained in the will of *Eliza Springett*, of certain freehold land at *Hawkhurst* to three of the Defendants, *Jesse Piper*, *Jesse Piper* the younger, and *Edward Piper*, on the ground that there was a secret trust for a charitable purpose.

The bill alleged that the testatrix had, previously to the execution of her last will, entertained a wish to build and endow certain almshouses and a hospital on the land which was the subject of the devise in question, and had consulted *E. J. Jenings*, her solicitor, and *Jesse Piper* the elder, on the subject; that she was at first desirous to accomplish this object by will, but being advised by *Jenings* that it could not legally be done by will, she set aside £3000, which was placed in the names of *Jenings*, *Jesse Piper* the elder, and *Jesse Piper* the younger, as a fund for the object she had in view, and executed an indenture of the 17th of March, 1866, whereby she declared the trusts of the sum of £3000, and also purported to convey certain land and buildings at *Hawkhurst*, being part of her real estate, to the said *E. J. Jenings*, *Jesse Piper* the elder, and *Jesse Piper* the younger, upon trust for building almshouses and a hospital as therein mentioned.

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This indenture was duly executed and enrolled in Chancery, but was inoperative, as the testatrix died nine months after its execution.

The testatrix made her will, dated the 21st of February, 1866, and thereby appointed *Jesse Piper* the elder, *Jesse Piper* the younger, and *Edward Piper*, her executors; and after certain bequests to her relations she declared her will to be, that in case she should not in her lifetime have well and effectually disposed of the land and buildings in question (being part of her hereditaments in the parish of *Hawkhurst*), she devised the same in that event to *Jesse Piper* the elder, *Jesse Piper* the younger, and *Edward Piper*, their heirs and assigns, as joint tenants; and added the following words: "I devise the rest of my freehold hereditaments in the parish of *Hawkhurst*, and all my freehold hereditaments in the parishes of *Ticehurst*," and other parishes in the will mentioned," to *T. B. Springett*" (the Plaintiff in the suit) "in fee simple. I bequeath the residue of my personal estate unto the said *Jesse Piper* the younger, and *Edward Piper*, as tenants in common."

The testatrix died on the 2nd of September, 1866.

The bill alleged that the devise was intended by the testatrix to be given to the said *Jesse Piper* the elder, *Jesse Piper* the younger, and *Edward Piper*, and was accepted by them upon the tacit understanding and trust that it should be applied for the purpose of building the said almshouses and hospital, and, in support of such allegation, referred to the instructions sent by *Jenings* to counsel for preparing the will, in which it was stated that the land comprised in the deed of gift was to be given by the will of the testatrix to the *Pipers* as joint tenants, "she having a full reliance that they would carry out her wishes as regarded the almshouses if she should not survive the enrolment of the deed for twelve months." The bill alleged that the said three Defendants had entered into possession after the execution of the deed, and had commenced the erection of the almshouses.

The bill charged that the said devise of the lands at *Hawkhurst* was under the circumstances void, and that the same passed to the Plaintiff under the residuary devise in the will; or that, if they did not so pass, then that they descended to the co-heiresses in gavelkind of the testatrix, and in that case the Plaintiff

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claimed, as trustee of the settlement of one of the co-heiresses, to be entitled to her share. It prayed a declaration that the devise might be declared void, as being upon a secret and illegal trust.

The Plaintiff entered into evidence in support of the allegations in the bill.

The Defendants to the suit were *Jenings*, the solicitor of the said three devisees, the co-heiresses in gavelkind of the testatrix, the persons who represented those who were deceased, and the Attorney-General.

The devisees admitted in the main the statements alleged in the bill, and one of them, *Jesse Piper* the elder, admitted that he had held frequent conversations with the testatrix on the subject of her wish to build and endow the hospital and almshouses; but they generally denied that the testatrix had ever made them or any of them promise, or that they or any of them had promised, or by silence implied, or induced the testatrix to suppose, that they would carry out her wishes or intentions with reference to the charity. They stated that they considered that the testatrix intended the lands to be at their absolute disposal, and that they so took them, but that, as she hoped and desired that they would voluntarily carry out her scheme, it was their intention to do so by all lawful means, if the Court should be of opinion that the devise was valid.

There were two questions in the case: first, whether, upon the evidence in the case, the devise was void, on the ground of there being a secret trust for the purpose of the charity; and, secondly, whether, if such were the case, the lands in question passed to the Plaintiff, or were undisposed of?

Mr. *Southgate*, Q.C., and Mr. *G. W. Collins*, for the Plaintiff:—

We submit that, under the circumstances of this case, the devise was made by the testatrix on the understanding and with the full belief that the devisees would carry out her wishes with respect to the charity if she died within a year after the execution of the deed of the 17th of March, 1866; and that the devisees either promised, or by silence led her to believe, that they would carry out her wishes: it is, therefore, a case of a secret trust for charitable purposes, and the devise is accordingly void: *Jones* v.

Badley (1); *Russell* v. *Jackson* (2); *Wallgrave* v. *Tebbs* (3); *Carter* v. *Green* (4); *Tee* v. *Ferris* (5).

If the devise is void, we contend that the lands in question passed to the Plaintiff under the words, "I devise the rest of my freehold hereditaments in the parish of *Hawkhurst*, and all my freehold hereditaments in the parishes of *Ticehurst*," &c., "to *T. B. Springett*." The case is governed by sect. 25 of the *Wills Act* (1 Vict. c. 26), which provides "that, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." Here, assuming the devise to be void, the lands must pass under the devise to the Plaintiff, which is tantamount to a residuary devise.

In *De Trafford* v. *Tempest* (6), where there was a bequest to the testator's wife of certain chattels in or about his dwelling-house, and a bequest to his son of "all his chattels not thereinbefore otherwise disposed of in or about the said dwelling-house," and the wife predeceased the testator, it was held to be a particular residue of all the chattels in the house not otherwise sufficiently disposed of, and that the gift to the wife having lapsed the son was entitled to the chattels bequeathed to her.

In *Culsha* v. *Cheese* (7), where a specific devise of certain estates was declared to be void, they were held to pass under the residuary devise. In *Bernard* v. *Minshull* (8), *Evans* v. *Jones* (9), and *Carter* v. *Haswell* (10), the question of what was included in a residuary clause was also considered.

In *Cogswell* v. *Armstrong* (11), where there was a specific devise of real estate, and a devise of "all other real and personal estates of which the testator might die possessed," the words were held to be

(1) Law Rep. 3 Eq. 635; Ibid. 3 Ch. 362.
(2) 10 Hare, 204.
(3) 2 K. & J. 313.
(4) 3 Ibid. 591.
(5) 2 Ibid. 357.
(6) 21 Beav. 564.
(7) 7 Hare, 236.
(8) Joh. 276.
(9) 2 Coll. 516.
(10) 26 L. J. (Ch.) 576.
(11) 2 K. & J. 227.

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a residuary devise within the meaning of the Act, and to pass the real estate of which the specific devise had lapsed. So in *Green* v. *Dunn* (1), where there was a lapsed devise, the estate was held to pass under the words, "all my hereditaments not hereinbefore devised."

In *Doe* v. *Walker* (2), where a testator, by a will made before the new *Wills Act* came into operation, devised all his land at *B.* upon certain trusts, and by his codicil, made after the *Wills Act* came into operation, gave all his lands at *B.* to another trustee upon the same trusts, it was held that under the codicil, which republished the will, certain lands at *B.*, purchased by the testator after the date of the codicil, were not undisposed of, but passed by the devise.

Upon the principle of these cases, we contend that the gift of the rest of the testatrix's hereditaments at *Hawkhurst* comprised the lands of which the devise, assuming our contention to be correct, is now void.

Sir *R. Baggallay*, Q.C., and Mr. *Peck*, for the Defendants, the three devisees:—

We admit that these Defendants were aware of the object of the testatrix, and that they intend now to carry that object out; but that is not sufficient to render void the devise. The true test to be applied in such cases is thus stated by Lord *Cairns* in *Jones* v. *Badley* (3): "The law applicable to the case being therefore free from doubt, we have to examine the facts for the purpose of ascertaining the answers to two questions: first, did the testatrix, so far as her own mind and intention were concerned, devise her residue to the Messrs. *Badley* in order that they might take, not beneficially, but as trustees for the accomplishment of some charitable purpose? and, secondly, if the first question is answered in the affirmative, was her mind and intention in this respect made known before her death to the Messrs. *Badley*, or either of them, or was the devise accepted by them, or either of them, expressly or tacitly, on this footing?"

The question then is, did the testatrix in the present case

(1) 20 Beav. 6. (2) 12 M. & W. 591.
(3) Law Rep. 3 Ch. 364.

communicate her intention to the devisees, or any of them? and did they accept the devise on the implied trust that they would carry it out? We submit the evidence fails to establish such a representation on her part to the Messrs. *Piper*, or such an acquiescence on their part, as would be sufficient to create a trust.

Mr. *Jessel*, Q.C., and Mr. *Hume*, for the co-heiresses in gavelkind of the testatrix:—

Assuming that the devise in question is void in law, the lands therein comprised did not pass to the Plaintiff, but were undisposed of. The only section of the statute which has any application to this case is the 25th; and the question is, whether "the residuary devise" there mentioned means such a devise as the one to the Plaintiff of "the rest of my freehold hereditaments situate in the parish of *Hawkhurst*."

The case of *In re Brown's Trusts* (1) is an express authority against the Plaintiff's contention. It was there held that an appointment by will of all other the hereditaments comprised in a settlement not thereinbefore disposed of was not residuary, but specific, and that certain void gifts to charities did not pass by it, but lapsed as unappointed.

The cases relied on by the Plaintiff are distinguishable. In *Green* v. *Dunn* (2) the question was, whether the words "my freehold, copyhold, and leasehold hereditaments not hereinbefore devised," which were far more general than those in the present will, constituted a residuary gift so as to include a lapsed devise; and your Lordship, while holding that it was a general residuary devise, observed (3): "I am unable to acquiesce in the argument which would treat these words as merely a short mode of describing the estates in various other places, the names of which were for brevity sake omitted"—shewing that, if similar words to those in the present will had been employed, your Lordship would have come to a different conclusion.

In *Cogswell* v. *Armstrong* (4) the words "all other real and personal estate of which I may die possessed," were held to be a residuary devise within the 25th section—which we do not dispute,

(1) 1 K. & J. 522.
(2) 20 Beav. 6.
(3) 20 Beav. 11.
(4) 2 K. & J. 227.

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but it does not govern the present case. *Evans* v. *Jones* (1) only decided that when a certain bequest which was excepted out of the residue failed, it then passed under the residuary gift, which was quite a different case from the present. In *De Trafford* v. *Tempest* (2) the question of the construction of the *Wills Act* did not arise.

In *Carter* v. *Haswell* (3) the words were far more comprehensive than in the present case.

None of the cases relied on by the Plaintiff's counsel are in conflict with the case of *In re Brown's Trusts* (4), which governs the construction to be put upon this will; and upon the authority of that decision, we submit that the gift was not a general residuary devise to the Plaintiff, but only a gift of the rest of her lands in the places named, which cannot pass those lands the devise of which is assumed to be void in law.

Further, even if this was a residuary devise, we contend that "a contrary intention appeared by the will."

Mr. *E. Cutler*, for other Defendants, supported the same contention, and referred to *Gale* v. *Gale* (5).

Mr. *F. T. White*, for the Defendant *Jenings*.

Mr. *Wickens*, for the Attorney-General.

Mr. *Southgate*, in reply:—

In re Brown's Trusts was not properly a case under the *Wills Act* at all: *Jarman* on Wills (6); and Vice-Chancellor *Wood* said that the 25th section of the Act had no reference to it. This is a case of a particular residuary gift, and the observations of your Lordship in *Green* v. *Dunn* (7) are applicable to it: "In the case of land by force of the statute, and in the case of personal estate by long-settled law, if the property be disposed of by general terms instead of by particular enumeration, it includes not merely the property not previously disposed of at the date of the will,

(1) 2 Coll. 516.
(2) 21 Beav. 564.
(3) 26 L. J. (Ch.) 576.
(4) 1 K. & J. 522.
(5) 21 Beav. 349.
(6) 3rd Ed. vol. i. p. 653.
(7) 20 Beav. 11.

but also all the property which at the death of the testator, when the will became operative, has, by force of any events, become undisposed of."

June 3. LORD ROMILLY, M.R.:—

The question here, as in similar cases, is, whether, from the circumstances of the case, the devisees took the property in such a manner that they considered, by what they had done or by what they had abstained from doing towards the testatrix, they were morally bound to devote the property to certain charities which she indicated.

In the present case, the facts establish that the testatrix intended to devote the property to charitable purposes, and that the devisees accepted it on those terms, and that they intended, and do intend, to carry the trust into execution.

[His Lordship then reviewed the evidence in the case.]

The testatrix made the devise and bequest to the Defendants, *Jesse Piper* the elder, *Jesse Piper* the younger, and *Edward Piper*, unconditionally, but in full reliance that in the event of her death rendering the deed of the 17th of March, 1866, void under the *Statute of Mortmain*, they would carry out the scheme by making a fresh charitable foundation on the same basis. Not only so, but the Defendant *Jesse Piper* the elder had frequent conversations with her on the subject of the charity. He made no promise, and she never asked for a promise, but by his silence she was induced to believe that he would carry out her wishes. The result is, that I am clear that this devise is void, and that this is a void trust.

Upon the other point, which is a question upon the construction of the *Statute of Wills*, I am against the Plaintiff. The cases which I have decided and the previous cases shew that the words relied on in the Statute refer to a general, not to a separate and distinct, residue.

The 24th section of the statute, which provides that a will shall be construed to speak from the death of the testator, does not appear to me to bear upon the case. The 25th section provides that, "unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to

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be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, shall be included in the residuary devise (if any) contained in such will." If there were a residuary devise in this will, which there is not, the lands devised to the three Defendants as joint tenants, which devise is void in law, would undoubtedly fall into it. But the testatrix here gives the lands in *Hawkhurst* in a certain event to the Messrs. *Piper*, and the rest of her freehold hereditaments in the parish of *Hawkhurst* and other parishes which she names to the Plaintiff. This cannot be construed to mean that if these persons were to die, then the whole of the land in *Hawkhurst* was to go to the Plaintiff. Supposing the devise were in this form, "I give a certain part of my property in the parish of *Hawkhurst* to *A. B.*, and the rest of my property in *Hawkhurst* to *C. D.*," and *A. B.* were to die, it could not be said that *C. D.* would have the whole, for he would only take the "rest" of the property in *Hawkhurst* subject to the devise.

I agree with Mr. *Jessel*, that the case of *In re Brown's Trusts* (1) is a distinct authority that the words in the 25th section of the Act apply to a general residuary devise, and not to a devise of the rest of the property in a place where parts of the property are given beforehand to other persons. The opposite construction would be inconsistent with the scope of the will. It is, in fact, to be treated as a specific devise of part of the land in *Hawkhurst* to the *Pipers*, and of the rest to the Plaintiff. There will, therefore, be a decree that the devise is void, and that the co-heiresses in gavelkind are entitled to the land. The costs of all parties will come out of the estate.

Solicitors: Messrs. *Monckton & Monckton*, agents for Messrs. *Monckton & Son, Maidstone*; Messrs. *Dawes & Son*, agents for Mr. *W. B. Young, Hastings*; Messrs. *Raven & Bradley*.

(1) 1 K. & J. 522.

THOMPSON *v.* HUDSON.

M. R.
1870
June
6, 7, 8, 27.

Mortgagor and Mortgagee—Account—Mortgagee in Possession—Sale of Mortgaged Property—Rests.

A mortgagee in possession, who sells part of the mortgaged property under a power of sale in the mortgage, must apply the proceeds of sale, first, in payment of interest and costs, and then either pay the balance to the mortgagor, or apply it in reduction of the principal due on the mortgage; and, in taking an account against the mortgagee, who has retained sale moneys beyond the interest and costs due, a rest must be made at the time of the receipt of the proceeds of sale, even although he may have entered into possession when the interest due to him was in arrear. The same rule applies where two distinct mortgages are held by the same person, who sells one of the mortgaged estates.

THIS was a summons adjourned into Court for the purpose of obtaining a decision on certain questions which had arisen between the Plaintiffs, who were trustees of certain mortgages of real estate which had been mortgaged to the *North Eastern Railway Company* by the Defendant *Hudson*, and *George Elliot*, who was a puisne incumbrancer. The questions were three in number. The first and second do not call for a report. The facts giving rise to the third are fully set out in the judgment, and may be briefly stated as follows:—

The Plaintiffs were entitled to a first mortgage on a freehold estate at *Whitby*, and to another first mortgage on a freehold house at *Albert Gate*. The interest on both mortgages fell into arrear, and the Plaintiffs entered into possession of both properties some time previously to 1861. In May, 1861, the Plaintiffs, under a power of sale in the mortgage, sold the house at *Albert Gate* for £21,600. In taking the account of what was due to the Plaintiffs, the Chief Clerk had calculated interest on the principal sums due on the mortgages up to the date of the certificate, and had then deducted therefrom the total amount received by the Plaintiffs, including the sum of £21,600; and he certified that the balance thus found was what was due to the Plaintiffs.

Mr. *Jessel*, Q.C., and Mr. *Jackson*, for *Elliot*:—

We say, in the first place, that although the Plaintiffs are

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entitled to consolidate their mortgages, still sums received from one of the estates must be applied in discharge of interest due on the principal charged on that estate, and then in discharge of the principal itself; and, if there is any surplus, in discharge of what is due on the other security. But if this be not so, still, at the utmost, sums received by the Plaintiffs must be applied in the first place in discharge of interest, and if there is any surplus it must go in discharge of principal, and not be kept in reserve to cover future interest on the whole principal.

Sir *Roundell Palmer*, Q.C., Sir *R. Baggallay*, Q.C., and Mr. *G. Williamson*, for the Plaintiffs:—

Whenever the same person holds two securities, the law incorporates them into one; and any person taking a subsequent charge on the property takes it subject to consequences which may follow from this well-known principle: *Watts* v. *Symes* (1); *Selby* v. *Pomfret* (2); *Neve* v. *Pennell* (3). Hence we are entitled to apply anything we have received in satisfaction of what is due to us on either mortgage; and, inasmuch as the interest was in arrear when we entered into possession, the account cannot be taken against us with rests: *Nelson* v. *Booth* (4). The principle is that a mortgagee is not to be compelled to receive payment of his debt by driblets, and the debt here is what is due on both mortgages.

Mr. *Jessel*, in reply.

June 27. LORD ROMILLY, M.R., after deciding the first two questions in favour of the Plaintiffs, continued:—

The third exception is of this character: it has been called taking the account with rests.

It arises thus: The Chief Clerk has taken the account in the usual way against a mortgagee in possession when no annual rests are directed. He has set down the sums received in one column, the interest due and the costs in a second column, and the capital debt in the third; and at the conclusion of the account he has

(1) 1 D. M. & G. 240.
(2) 1 J. & H. 336; 3 D. F. & J. 595.
(3) 2 H. & M. 170.
(4) 3 De G. & J. 119.

deducted the sums received in the first column from the aggregate amount of the principal, and the interest and costs in the two other columns. The applicant insists that, when the sums received in the first column far exceeded the interest and costs due, the balance should have been deducted from the principal, and that it should have (which it has not) been set down in part discharge of the principal.

As a general rule, there can be no doubt that the Chief Clerk is correct in the manner in which he has taken the account. But there is this peculiarity in this case, which, in my opinion, makes it exceptional. In May, 1861, the railway company sold part of the property mortgaged to them, namely, the house at *Albert Gate*, to the French Government for £21,000. The effect of this immediately was to put £20,000 in the hands of the railway company above the interest and costs due to them. The case, which is fully made out by an inspection of the accounts, is this: The account is perfectly correctly taken up to the 30th June, 1861, and up to that time no receipts are sufficient to do more than discharge the interest due; but on the 4th of May, 1861, the railway company received £21,600 from the French Government for the purchase-money for the *Albert Gate House*. The result was that on the 30th of June in that year the account stood thus: the principal debt due by Mr. *Hudson* to the company was £118,521, and the interest and costs due were £29,221 11*s.* 11*d.*, while, on the other hand, the amount received by the railway company at that time was £49,894 12*s.* 4*d.* If from this is deducted the sum of £29,221 11*s.* 11*d.* due for interest and costs, the balance is £20,673 0*s.* 5*d.*, which was due to *Hudson*, unless applied in reduction of principal.

That is, the railway company had then in hand upwards of £20,000 after all interest and costs had been paid, which was the property of *Hudson*. What were they to do with it? They might pay it over to him; they were not bound to do so; but I think it impossible that they can contend that they are entitled to keep this money, to make interest upon it for ten years, and still to charge interest on the whole amount due to them on the larger sum. It is not a case of rests or one of taking the account in any particular manner, but it is a case of this description: a mortgagee

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in possession with a power of sale sells a large portion of the estate, say one half, and receives purchase-money sufficient to pay all interest and costs and half the principal due. Can the mortgagee say, I will charge interest in future on the whole debt and only allow the mortgagor the rents received for the unsold moiety, and nothing in respect of interest on the money received and employed by the mortgagee? I think not. I am of opinion, therefore, that the third exception must be allowed, and that the proper mode of adjusting the account in such a case is to wipe off so much of the principal as the surplus of the purchase-money, after payment of interest and costs, will discharge, and then go on with the account as against a mortgagee in possession, but with an altered and diminished debt. See what injustice a different rule would inflict. The amount can not affect the principle. Suppose a mortgagee in possession of two estates with a power of sale; the mortgage is for £50,000 at 4 per cent., the net rental is £2000 per annum. Shortly after taking possession the mortgagee sells one estate for £25,000, and reduces the sum received from the rents to £1000 per annum; at the end of ten years, if he had not sold anything, the principal of the debt would have remained unpaid with no arrear of interest; but on the principle on which this account is taken the mortgagee would have received half his capital, and the interest due to him would be augmented by £10,000. It is true, as said by counsel for the railway company, that a mortgagee is not obliged to accept payment of part of the debt, and that the whole must be paid, if any; but, then, why do they retain £20,000 belonging to Mr. *Hudson?* If they merely kept down the interest and paid the balance over to Mr. *Hudson* I should assent, but not when they actually keep in their hands and make interest on the sums received at a rate, if employed in the conduct of the railway, as I assume it to have been, at least as great as they are able to charge against Mr. *Hudson* on this account. Nothing obviously could be more unjust or more pernicious in its result, or one which would ultimately more certainly take away the whole property of the mortgagor than to allow the mortgagees to go into possession, under a power of sale, to allow them to pay off the greater part of this one debt and diminish the source from whence the interest is to be paid, and

yet to charge interest on the whole debt as it stood when he first took possession. The result is that, in my opinion, the balance of capital due on the 30th of June, 1861, ought to be reduced from

	£118,521 11 10
by deducting	20,673 0 5
leaving the balance to be	97,948 11 5

and on the diminished amount to calculate further interest. This will materially affect the subsequent calculations of interest and the balance ultimately found to be due. No costs of the exceptions.

Solicitors: Messrs. *Williamson, Hill, & Co.;* Messrs. *Elmslie, Forsyth, & Sedgwick.*

FINCH *v.* LANE.

Will—Construction—Contingent Remainder—Executory Gift—Gift to A. if living at the Death of B., followed by Gift over if A. should die in the Lifetime of B. without leaving Issue.

By a will the testator gave real and personal estate to *M. H.*, her heirs, executors, administrators, and assigns absolutely, if she should be living at the death of the testator's wife; but in case *M. H.* should die in the lifetime of the testator's wife without leaving issue her surviving, then over:—

Held, that *M. H.* took an absolute interest, liable to be divested only in the event of her death in the lifetime of the testator's widow without leaving issue.

JOHN WISE, the testator in the cause, by his will, dated the 4th of August, 1849, made the following disposition of his residuary estate: "As to the net dividends and annual produce arising from my residuary personal estate, and also as to all my real estate whatsoever and wheresoever, I give, devise, and bequeath the same, and every part thereof respectively, unto my said wife for her own sole use and benefit during her natural life. And from and immediately after the decease of my said wife I give and devise my two cottages in *Old Windsor Common*, and also the cottage at or near *Blackness* toll-gate, occupied by *William Pickle*, to my brother *James Wise* for the term of his natural life. And from and imme-

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diately after the decease of my said wife I give, devise, and bequeath all my real estate (subject to the life interest of my said brother *James* in such parts thereof as aforesaid) and all my personal estate and effects not otherwise disposed of, to *Mary Ann Houlton* (the daughter of my said wife), her heirs, executors, administrators, and assigns absolutely, if she shall be living at the time of the death of my said wife. But in case the said *Mary Ann Houlton* shall die during the lifetime of my said wife without leaving lawful issue her surviving, then I give, devise, and bequeath all my real estate (subject to the life interest of my brother *James* in such part thereof as aforesaid), and also all my personal estate whatsoever and wheresoever, not otherwise disposed of, unto my nephew *William John Wise*, and my said wife's niece, *Mary Joy Houlton* (daughter of the late *James Houlton* and *Mary*, his wife), their heirs, executors, administrators and assigns, to be equally divided between them as tenants in common, and not as joint tenants."

The testator died in December, 1851. *Mary Ann Houlton* intermarried with the Plaintiff, *William Finch*, and had issue by him one son only, the Plaintiff *Arthur Finch*. She died on the 2nd of May, 1857, leaving *William Finch* and *Arthur Finch* her surviving.

Mary Wise, the widow of the testator, died in September, 1865. The testator was, at the time of his death, entitled to considerable personal estate, and also to an equitable interest in certain real estate; and the bill was filed for the purpose of obtaining a declaration as to the rights of the parties therein.

Mr. *Jessel*, Q.C., and Mr. *Bevir*, for the Plaintiffs, the heir-at-law and legal personal representative of *Mary Ann Houlton*, submitted that, upon the true construction of the will, she took an absolute interest, liable to be divested in the event of her dying without issue in the lifetime of the testator's widow, which had not happened; and they cited *Edwards* v. *Hammond* (1) and *Phipps* v. *Ackers* (2).

Mr. *Southgate*, Q.C., and Mr. *Vaughan Hawkins*, for the heir-at-law of the testator:—

Mary Ann Houlton was to take only in the event of her surviving

(1) 1 B. & P. (N. R.) 324, n. (2) 9 Cl. & F. 583.

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the testator's widow, which she has not, and consequently there is an intestacy. In the cases cited there was a gift to *A.* if a certain event should happen, and if not, then over; and the Court held that the happening of the event was a condition subsequent, and not a condition precedent. But it is impossible so to hold in this case, because the gift over is, in the event of *Mary Ann Houlton* dying without issue, a different event from that on which she is to take the estate.

Mr. *Francis Webb*, for the persons claiming under the gift over.

Mr. *Kekewich*, for the executor of the testator.

LORD ROMILLY, M.R.:—

I think that the testator intended to give to *Mary Ann Houlton* an absolute interest, with an executory gift over in the event of her dying without issue. The case is governed by *Phipps* v. *Ackers* (1). The event on which the gift over was to take effect has not happened, but there is no intestacy, and consequently the Plaintiffs are entitled.

Solicitors: Messrs. *G. L. P. Eyre & Co.; J. R. Reep; Mackenzie, Trinder, & Co.*

In re ESTATES INVESTMENT COMPANY.

M. R.
1870
July 28.

McNIELL'S CASE.

Company—Winding-up—Contributory—Fraudulent Prospectus—Repudiation—Laches.

M., a shareholder in a company, discovered fraudulent misrepresentations in the prospectus on the faith of which he had taken his shares, and thereupon repudiated the shares, both privately, in an interview with the secretary, and publicly, at a meeting of shareholders. Other shareholders also repudiated their shares, and instituted proceedings for the purpose of having their names removed from the register, while the company commenced actions against them for the recovery of unpaid calls; but *M.* took no steps whatever, nor were any steps taken against him. After the public meeting, *M.* received two circulars issued by the directors of the company, one of which stated that,

(1) 9 Cl. & F. 583.

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McNIELL'S CASE.

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427-8, 433

at the request of the dissentient shareholders, they had consented to stay legal proceedings for a time, with a view, if possible, of amicably settling their differences, and that they would, as soon as possible, communicate the result to the shareholders; and the other stated that the directors intended to appeal against a decision in a suit instituted by one of the shareholders for the purpose of being relieved from his shares. The company having been ordered to be wound up:—

Held, that, under the circumstances, *M.* was not a contributory.

THIS was an application by *William McNiell* to have his name removed from the list of contributories of the *Estates Investment Company, Limited.*

The company was duly registered under the *Companies Act*, 1862, on the 15th of February, 1865. In May following the prospectus of the company was issued. On the 15th of May, *McNiell*, on the faith of the statements in this prospectus, applied for twenty-five shares in the company, and paid the usual deposit on such application. On the 23rd of May twenty-five shares were allotted to him, and due notice of such allotment was sent to and received by him, and his name was entered on the register of shareholders. On the 30th of May a call, payable after allotment, became due on the shares, but was never paid. Shortly after that date, but when did not appear, *McNiell*, as he deposed, became aware that the prospectus contained false statements, and he thereupon went to the office of the company and saw the secretary on the subject, and there and then repudiated the shares. He afterwards attended a public meeting of the shareholders on the 18th of July, and, as he deposed, repeated his repudiation of the shares.

In the meantime many other allottees of shares had repudiated the shares allotted to them, and had refused to pay the calls thereon. The company brought actions against several of them for the recovery of the calls; and thereupon one of these shareholders, named *Ross*, instituted a suit of *Ross* v. *Estates Investment Company* for the purpose of having the allotment to him set aside and the action brought against him restrained. An arrangement was then made (the details of which are given in *Pawle's Case* (1)) by which the actions commenced by the company were stayed to abide the result of *Ross's* suit.

(1) Law Rep. 4 Ch. 497.

No action was brought against *McNiell*, and he was no party to this arrangement.

In August, 1865, a circular signed by the secretary of the company was sent to all the shareholders. It stated that the directors had, at the request of the dissentient shareholders, consented to stay legal proceedings until the following November, with a view, if possible, of amicably settling their differences; and that the directors would, as soon as possible, communicate the result to the shareholders. This is more fully set out in the report of *Ashley's Case* (1).

In November, 1866, a decree in favour of the Plaintiff was made in the suit of *Ross* v. *Estates Investment Company* (2), and this was afterwards affirmed on appeal (3).

On the 16th of March, 1867, an order for winding up the company compulsorily was made.

McNiell's name was never removed from the register of shareholders; but he deposed that until after the winding-up order was made he did not know that his name had been placed thereon; but he admitted having received the circular of August, 1865, and another in November, 1866, stating that the company intended to appeal from the decision which had then just been given in *Ross's* suit.

McNiell was subsequently settled on the list of contributories.

The only evidence in support of the present application was an affidavit by the applicant containing statements to the effect already mentioned; and the only evidence in opposition to it was an affidavit by Mr. *Parry*, the secretary of the company, who thereby deposed that, to the best of his knowledge, information, and belief, he never saw *McNiell* with reference to the affairs of the company or the shares taken by him, at any time previous to the meeting of the 18th of July; and that at that meeting (which appeared, however, to have been somewhat noisy) he did not hear *McNiell* make the statement which he alleged he had made on that occasion; and, further, that he had sent to *McNiell* the circulars which were sent to other members of the company, viz., those of August, 1865, and November, 1866.

(1) Law Rep. 9 Eq. 263. (2) Law Rep. 3 Eq. 122.
(3) Law Rep. 3 Ch. 682.

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Mr. *Jessel*, Q.C., and Mr. *Everitt*, in support of the application:—

This falls within the decision in *Pawle's Case* (1). It is distinguishable from *Ashley's Case* (2), inasmuch as *Ashley* never did anything to shew that he repudiated his shares until long after he had discovered that there were misrepresentations in the prospectus. Here, on the contrary, *McNiell* repudiated his shares immediately.

Mr. *Roxburgh*, Q.C., and Mr. *Higgins*, for the liquidator:—

McNiell has entered into a contract to take these shares, by which he is bound. His name was put on the register, and remained on it until the company was ordered to be wound up. It was his duty to take active steps to have his name removed from the register if he wished to be relieved from the liability attached to these shares: *Pawle's Case; Reese River Silver Mining Company* v. *Smith* (3); *Oakes* v. *Turquand* (4); *In re Cleveland Iron Company, Ex parte Stevenson* (5). Even if he were not so bound he ought to have repudiated by writing. In fact, the evidence of repudiation is not such that the Court can act upon it.

Lord Romilly, M.R.:—

It is very necessary in these cases not only to prevent a contributory from playing fast and loose, but to prevent the company also from playing fast and loose; and as the company alone has the control over the register, and over the returns it has got to make to the Registrar of Joint Stock Companies, I do not think that documents which they hold in their own hands can be held conclusive against a contributory, who, in other respects, has done what is fit and proper in the matter. I think the question may fairly and properly be tried by putting it as if he was bound by acquiescence. In the case of *Kisch* v. *Venezuela Railway Company* (6), if I recollect right, the shareholder who repudiated spent some months in examining the books and investigating the affairs of the company,

(1) Law Rep. 4 Ch. 497.
(2) Ibid. 9 Eq. 263.
(3) Ibid. 4 H. L. 64.
(4) Ibid. 2 H. L. 325.
(5) 16 W. R. 95.
(6) 3 D. J. & S. 122; Law Rep. 2 H. L. 99.

after first being put on inquiry and before he filed the bill, and it was held that the time so employed was not sufficient to bar him from proceeding against the company. But in *Ashley's Case* (1) I held that a shareholder who was perfectly silent, and did nothing, could not repudiate. He knew all that was taking place; he attended the meetings; but he remained perfectly silent, and took no steps whatever in the matter, until after the decision in the case of *Ross* v. *Estates Investment Company*. As soon as the decision in that case was given he repudiated the shares; but it might reasonably be inferred that if the judgment had been the other way he would have kept his shares.

[His Lordship then commented on the affidavits filed by the applicant and the secretary of the company, and came to the conclusion that the statements of *McNiell* as to his having repudiated the shares must be taken to be true, and he then continued:—]

The next point is this: Actions were brought against a Mr. *Ross* and eight or nine other shareholders who had repudiated. These shareholders associated themselves together, and subscribed to defend the actions, and by an arrangement they were all held to be in the same class and category with Mr. *Ross*. At the same time, there being a great number of shareholders, of whom Mr. *McNiell* was one, who had refused to pay the allotment money, the company sends a circular to say that in consequence of their proceedings with *Ross* they do not intend to sue those persons. Now, assume that after Mr. *Ross's* suit had been going on for some time it had been compromised, instead of being decided in favour of Mr. *Ross* in November, 1866, and thereupon they had brought an action against Mr. *McNiell* for the payment of those shares, and thereupon he had filed a bill in this Court, praying to have the contract set aside on the ground of misrepresentations, could it by possibility be said he was bound by laches and acquiescence in that state of circumstances, taking into consideration all that had occurred, that Mr. *McNiell* had repudiated the shares, and that notice had been given by the company that they were not intending to sue during the pendency of this suit? If he was at liberty to file a bill for that purpose, I am of opinion he is at liberty to defend himself against the attempt to put him on the

(1) Law Rep. 9 Eq. 263.

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list of contributories. I make this distinction between his case and Mr. *Ashley's* case: Mr. *Ashley* could have said at any time he was a member of the company; but, assuming what Mr. *McNiell* says to be true, even to the qualified extent that it is not contradicted by Mr. *Parry*, I am of opinion that he could not at any time have said he was a shareholder of the company, and he could not have enforced payment to him of dividends if the company had been successful. I am of opinion that he is entitled to be off the list of contributories.

Solicitors: Messrs. *Batt & Son;* Mr. *H. Harris.*

HASSALL *v.* WRIGHT.

V.-C. M.
1870
May 27.

Patent—Registration of Assignment of Patent—Suit by unregistered Assignee of Patent—Patent Law Amendment Act, 1852 (15 & 16 *Vict.* c. 83), s. 35.

The assignee of a patent may maintain a suit against the assignor, and subsequent licensees from the assignor with notice of the assignment, to restrain them from using the patent, although at the time of the institution of the suit the assignment has not been registered pursuant to the 35th section of the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83).

Semble, registration of the assignment of a patent relates back to the date of the assignment, so as to entitle the assignee to maintain a suit to restrain infringement instituted between the dates of the assignment and the registration.

By an indenture of the 5th of February, 1867, between the Defendant, *Benjamin Wright*, of the one part, and the Plaintiff, *Henry Thomas Hassall*, of the other part, it was agreed that the Plaintiff should be the sole manufacturer of a patented invention, of which *Wright* was the patentee, so long as the Plaintiff should be able to supply and should well and punctually supply the demand to the satisfaction of *Wright*, his executors, administrators, or assigns; but that in case the Plaintiff should not within six weeks after receipt of any order execute such order and supply the demand occasioned thereby to the satisfaction of *Wright*, his executors, administrators, or assigns, then *Wright*, his executors, &c., should be at liberty to manufacture the invention. The deed contained various covenants on the part of the Plaintiff, and provided that in case of default on the part of the Plaintiff in performing and carrying out any of the stipulations on his part contained in the deed, *Wright*, his executors, &c., should thenceforth be fully released and discharged from all obligations on his and their part under the deed.

The deed was prepared by *Wright's* solicitor, and the Plaintiff did not employ a solicitor in the transaction.

In January, 1870, *Wright* granted a license to the Defendants, *Thomas Marshall*, *Thomas Watson*, and *Thomas Parkin Moorwood*, to manufacture the patented invention, at the same time informing them of the deed of February, 1867, but alleging that the Plaintiff had not performed his part of the agreement, and had

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thereby forfeited his exclusive right to manufacture the patented invention.

In March, 1870, the Plaintiff instituted this suit against *Wright* and the three licensees for an injunction to restrain *Wright* from permitting or suffering any person or persons other than the Plaintiff to manufacture, and to restrain the licensees from manufacturing, the patented invention; and a motion was now made for an injunction against all the Defendants in these terms.

The deed of February, 1867 (which was not executed in duplicate), was retained by *Wright's* solicitor, and was not registered under the 35th section of the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83) (1), until May, 1870, after the notice of the present motion. The license granted by *Wright* to the other Defendants had not been registered.

Upon the motion being opened, a preliminary objection was taken on behalf of all the Defendants, that the non-registration of the deed of February, 1867, at the time of the filing of the bill was a bar to the Plaintiff's right to sue.

Mr. *Glasse*, Q.C. (Mr. *Ince* with him), for the Plaintiff, submitted that it was the duty of *Wright's* solicitor to have registered the deed, and that assuming registration to be necessary, *Wright* could not be allowed to take advantage of the neglect of his solicitor, and cited *Re Green's Patent* (2) to shew that registration relates back to the date of the assignment. [He was then stopped by the Court.]

Mr. *Cole*, Q.C., for the Defendant *Wright*:—

The policy of the law requires that the assignee of a patent, until his title appears on the register of proprietors, shall not be

(1) This section, after providing that a "Register of Proprietors" shall be kept at the office for filing specifications, wherein shall be entered the assignment of any letters patent or any share or interest therein, and any license under letters-patent, and that copies of entries in the register shall be *primâ facie* proofs of the assignments or licenses, contains a proviso "that until such entry shall have been made, the grantee or grantees of the letters patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters patent, and of all the licenses and privileges thereby given and granted."

(2) 24 Beav. 145.

able to maintain a suit in the character of proprietor of the patent. The words of the Act are clear, and the Court is bound to regard *Wright*, the grantee of the patent, as having been the sole and exclusive proprietor of the patent at the time of the institution of the suit. In *Chollett* v. *Hoffmann* (1) the want of registration of the assignment was held to be a fatal bar to an action by the assignee against an infringer. Lord *Campbell*, in delivering the judgment of the Court, says, "Until the entry is made no legal interest passed by the indenture, and nothing beyond the right to have the title completed." In that case the question was between the assignee and a third party, but upon the words of the Act the unregistered assignee cannot be treated as the proprietor, whether he is asserting his right against the original grantee or against a third party. *Re Green's Patent* (2) was an application to the Master of the Rolls under the special jurisdiction given to him by the 38th section of the *Patent Law Amendment Act*, 1852, to expunge an improper entry from the register, and has no bearing upon the construction of the 35th section, or the right of the assignee to maintain a suit in Equity. It was no part of the duty of *Wright's* solicitor to see that the Plaintiff perfected his title by registration.

Mr. *Rigby*, for the other Defendants:—

Whatever may be the right of the Plaintiff as against *Wright*, *Chollett* v. *Hoffmann* is a clear authority that at the time of the institution of this suit he could not maintain a suit against any other person. No doubt these Defendants, when they took the license from *Wright*, had notice of the previous agreement with the Plaintiff, but they were entitled under the Act to deal with *Wright* as the sole and exclusive proprietor. They were no more bound to regard the previous unregistered assignment than a subsequent purchaser for value is bound to regard a previous voluntary conveyance, which is, by statute, made void as against him. The very object of the 35th section was to relieve persons dealing with patents from the necessity of looking behind the register, or being affected by equities not disclosed by the register. As the assignment has now been registered the Plaintiff may be in

(1) 7 E. & B. 686. (2) 24 Beav. 145.

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a position to institute a new suit, but he cannot maintain this suit on the strength of a title acquired after bill filed: *Godfrey* v. *Tucker* (1); *Attorney-General* v. *Portreeve, &c. of Avon* (2). This is not a suit for specific performance of the agreement of February, 1867, but a suit for an injunction on the footing that the Plaintiff's title to the patent is complete.

[The VICE-CHANCELLOR:—Your license is not registered, therefore, according to your own argument, you have no title.]

That may be so, but the question is, whether the Plaintiff has any right to maintain a suit against us.

SIR R. MALINS, V.C.:—

This is a preliminary objection to the Plaintiff proceeding with his suit. The Defendant, *Benjamin Wright*, in the year 1866, invented a new kitchen range. On the 5th of February, 1867, he granted, for valuable consideration, the sole and exclusive license to manufacture the patented articles to the Plaintiff. A formal deed was executed, and it is admitted on both sides that the only legal adviser employed in the transaction was Mr. *Barnes*, of *Lichfield*. Mr. *Cole*, who, on behalf of *Wright*, takes this preliminary objection, says that *Barnes* was the solicitor of *Wright* only. However that may be, it is certain that he was the only legal person employed; and if, in order to confer any kind of title upon the Plaintiff, registration of the deed was necessary, then it was the duty of *Wright's* solicitor to tell the Plaintiff, who was unlearned in the law, of that fact, and I am clearly of opinion that *Wright* is bound by the acts of his solicitor, and it would be a monstrous injustice if I were to allow him to take advantage of the fact of his own solicitor having omitted to perform an obvious duty towards the opposite party. The deed has now been registered, and, if it were necessary, in such a case I should hold that, it being now registered, that registration has relation back to the original contract, and gives it validity. But I am very strongly of opinion that it is not necessary, according to the Act of Parliament, that I should have recourse to that doctrine. The Act of Parlia-

(1) 33 Beav. 280. (2) 33 L. J. (Ch.) 172.

ment is not like the Copyright Act (5 & 6 Vict. c. 45, s. 24), which contains express language, that until the registration of the copyright no person interested shall be able to maintain any suit at law or in equity. This 35th section of 15 & 16 Vict. c. 83, simply enacts that "until such entry shall have been made, the grantee or grantees of the letters-patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters-patent, and of all the licenses and privileges thereby given and granted;" that is, until registration the original patentee shall be deemed to be the proprietor. It does not, as in the Copyright Act, go on to enact that any person on obtaining a license or an assignment shall not, until registration of the license or assignment, be able to maintain a suit. But it is quite true that in the Court of Queen's Bench it has been decided, that where the assignee of a patent sues at law for the infringement of a patent a third person, not the grantor, he is unable to maintain his suit; because the Act of Parliament says, that until the assignment is registered the original patentee must be deemed to be the owner of the patent. But even there the Court of Queen's Bench reserved the question of the right as between the grantor and grantee; they do not say there is no title, they assume that he may be entitled to maintain a suit on having his title perfected. That is the express language of Lord *Campbell* in giving judgment, and he says it is not necessary to decide the question, whether the registration relates back. I should say that under the circumstances here it has relation back, and gives a title to the licensee *ab initio*. But what is the case here? It is the case of an assignee suing, not third parties, but the man who for valuable consideration had, upon full and complete advice of his own solicitor, granted to him the exclusive right to manufacture the patented article; and it is this man who now sets up that the Plaintiff cannot maintain a suit, because the deed was not registered. The contention is, in my opinion, utterly unsustainable; and I therefore overrule it, so far as *Wright* is concerned.

Then with regard to the other Defendants, who, with a full knowledge of the Plaintiff's rights, with full knowledge that *Wright* had, for valuable consideration, granted the exclusive right of manufacturing this patented article to the Plaintiff, took

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Wright's representation that the Plaintiff had not a title, made no communication with the Plaintiff, but took the title with all its perils; the absurdity of their position is this, that according to the argument of their learned counsel, which is that the Plaintiff has no title because he is not registered, they themselves not being registered have no kind of title, and having no kind of title they gravely argue that the Plaintiff cannot maintain a suit against *Wright*. If they have no title, it may be a very good reason upon the hearing of the cause, or even upon the motion, why the motion should be refused against them, or why the bill should be dismissed against them. But how it can possibly be a ground for them, who have no title whatever, to argue that as between the Plaintiff and another man the suit cannot be maintained by the Plaintiff, I am unable to see. The objection taken is utterly unsustainable and without foundation on the part of any of the Defendants, and therefore the Plaintiff's counsel may go on with the motion.

The motion was then heard, and on the 2nd of July an injunction was granted against all the Defendants. The Defendant *Wright* appealed, and on the 12th of July the appeal motion was refused with costs by Lord Justice *James*, but the objection on the ground of the non-registration of the deed was not raised on the appeal motion.

Solicitors for the Plaintiffs: Messrs. *Heal & Coode.*
Solicitors for the Defendants: Messrs. *J. & C. Cole.*

In re WYNN HALL COAL COMPANY.
Ex parte NORTH AND SOUTH WALES BANK.

V.-C. M.
1870
June 4.

Company—Winding-up—Directors—Unregistered Mortgage—Companies Act, 1862, s. 43.

In the winding up of a company registered under the *Companies Act*, 1862, directors will not be allowed to set up against the general creditors a mortgage of, or charge on, the property of the company not registered pursuant to the 43rd section of the Act.

Quære, whether an unregistered mortgagee, not being a director, can set up his mortgage against the unsecured creditors.

A company, whose articles of association authorized the directors, with the sanction of a resolution of the company, to borrow money on mortgage, being indebted to their bankers on an overdrawn account, the payment of which some of the directors had personally guaranteed, passed a resolution authorizing the directors to raise money on a mortgage of the property of the company, to be applied in discharging the liabilities of the company, or any director or other person on behalf of the company, to the bankers; the resolution also confirmed the acts of the directors and any sureties of the company in reference to the creation or continuance of the liabilities to the bankers, and declared that the bankers, directors, and sureties should stand in the same position as to their claims against the company as if such liabilities had been originally loans specially authorized and secured by mortgage under the articles. No mortgage was executed, the resolution was not communicated to the bankers, and no charge on the property of the company in favour of the bankers or the guaranteeing directors was registered under the 43rd section of the *Companies Act*, 1862:—

Held, in the winding-up of the company, that the resolution not having been communicated to the bankers did not entitle them to a charge on the property of the company; and that, assuming the resolution to have created a charge in favour of the guaranteeing directors, their omission to register it disentitled them to set it up against the general creditors of the company.

THIS was a claim, adjourned from Chambers at the request of the claimants, in the winding-up of the *Wynn Hall Coal Company, Limited*, on the part of the *North and South Wales Bank*, to have a charge on all the property of the company for £2000, due to them from the company on an overdrawn account, and £500 lent by them to the company.

The company was formed and registered under the *Companies Act*, 1862, in May, 1865, for the purpose of purchasing and working a coal mine.

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By the articles of association (sect. 24) the directors were authorized, from time to time, under a resolution of the company made in ordinary or special general meeting (at which meeting there should be present in person, or by proxy, two-thirds in number and value of the shareholders), to borrow any sum or sums of money not exceeding £5000, and to mortgage or charge the works, hereditaments, premises, plant, property, and effects of the company, to secure the repayment of the money to be borrowed.

The former owners of the mine had kept an account with the *North and South Wales Bank*, and had deposited the lease of the mine with the bank as a general security for their account. The company, soon after its formation, opened an account with the bank, and the directors allowed the bank to retain the lease as security for their account, and four of the directors gave to the bank their joint and several guarantee for the payment of the company's debt to the bank on their account current to the extent of £2000.

In June, 1868, the directors convened a special general meeting of the company, for the purpose of passing a resolution authorizing them to borrow money on mortgage for the purpose of discharging the liabilities of the company.

At this meeting, which was held on the 17th of June, 1868, two-thirds in number and value of the shareholders being present, the following resolution was passed:—

"That the directors be instructed and authorized to borrow on mortgage the sum of £5000 at such rate of interest as the directors shall think reasonable; and in order to secure the repayment of the moneys so to be borrowed, and the interest thereof, and any lawful or usual costs, charges, and expenses, that the directors be and they are hereby authorized to pledge, mortgage, or charge the works, hereditaments, premises, plant, property and effects of the company; and in any such mortgage there may be inserted, if the directors shall think fit, a power of sale and all other usual powers, provisos, agreements and declarations; and that the directors be authorized and empowered to affix the common seal to any such mortgage so authorized as aforesaid; that in case any director, shareholder, or other person shall, at the request of the directors, in any manner become personally liable as a surety for any money so to be borrowed on mortgage, or any part thereof, either by means

of the mortgage deed or any other document, such surety shall be indemnified and saved harmless out of the property and effects of the company, which shall, subject to the principal debt, be considered as mortgaged or pledged for such purpose; and the directors shall be and they are hereby authorized, when called upon by such surety, to execute to him a mortgage or other security contemplated by Article 24 for such indemnity and repayment of any moneys advanced by him; that the moneys so to be raised by mortgage under the resolution shall be applied by the directors, after the payment of all costs, charges, and expenses attendant thereon, in or towards satisfying and discharging all the liabilities of the company, or any director, shareholder, or other person on behalf of the company, to the *North and South Wales Bank*, whether due to the bank for an overdraw, with interest, commission, and charges, or upon bills, notes, or securities of the company, or any other person collaterally with the company, and whether such liabilities should have been incurred in strict accordance with the articles of association or not, and any surplus which may remain may be expended and applied by the directors at their discretion in aid of the general objects of the company; and that the acts of the directors, and any sureties of the company in reference to the creation or continuance of the said liabilities to the *North and South Wales Bank*, or any such collateral liabilities as aforesaid, shall be, and the same are hereby authorized and confirmed; and that the said bank, collateral creditors, directors, and sureties shall stand in the same position as to their claims against the company as if such liabilities had been originally loans specially authorized and secured by mortgage under the said 24th article."

There was no evidence that the bank had ever asked for further security for their debt, or that the above resolution was communicated to them. No mortgage of the property of the company was executed, and no charge on the property of the company was registered under the 43rd section of the *Companies Act*, 1862.

In September, 1869, the bank advanced £500 to the company, for which the same four directors and another director gave their joint and several promissory note as sureties for the company.

The company, soon afterwards, went into voluntary liquidation,

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in consequence of the mine having been drowned out; and in November, 1869, the voluntary winding-up was ordered to be continued under the supervision of the Court.

It was admitted that, if the claim was allowed, there would be nothing left for the general creditors. It was also admitted that the bank were satisfied with the security of the guarantee of the directors, and that the claim was made for the benefit of the directors.

Mr. *Cotton*, Q.C., and Mr. *Freeling*, for the claimants:—

The resolution of June, 1868, gave to the bank and to the directors, the guarantors, a charge on all the property of the company. The concluding words of the resolution expressly place the bank and the directors in the same position as if the company's debt to the bank, for which the directors had become sureties, had been a loan raised and secured by mortgage under the 24th article. The main object of the resolution was either to pay or secure the debt of the bank, and it can make no difference in equity whether or not the directors went through the form of reborrowing from the bank the amount of their debt, and executing a formal mortgage to secure it. Even if the bank are not entitled to be treated as mortgagees, the directors ought not to be deprived of the benefit of the indemnity intended to be given to them, because, relying on the last clause of the resolution, they refrained from putting the company to the expense of having a formal mortgage executed.

Mr. *C. Hall*, and Mr. *Shebbeare*, for unsecured creditors:—

The first part of the resolution, which authorizes the directors to raise money on mortgage, to be applied in discharging the liabilities of the company to the bank, clearly creates no charge in favour of the bank or of the directors. The bank never asked for any security, no mortgage was executed to them, and the resolution was not even communicated to them. As to the last clause of the resolution, it was probably intended to give validity to the equitable mortgage of the mine by the deposit of the lease, which mortgage had been created or continued by the directors without the authority of a resolution under the 24th article. If, however, it can be construed as creating a charge on all the property of

the company to secure an antecedent debt, it is invalid, at all events against creditors of the company, not being within the borrowing power given by the 24th article.

[The VICE-CHANCELLOR referred to *In re General Provident Assurance Company* (1).]

That is a clear authority for the proposition that, in exercising borrowing powers, the terms of the articles must be strictly complied with. Moreover, the concluding words of the resolution, "secured by mortgage under the said 24th article," are too vague and indefinite to create a charge. The claimants ask the Court to create an imaginary mortgage, and to assume that it would have included all the property of the company.

But, even if the resolution had amounted to a charge, the omission to register it under the 43rd section of the *Companies Act*, 1862, would have disentitled the bank, and, *à fortiori*, the directors whose duty it was to register it, from setting it up against the creditors of the company.

Mr. *Crossley*, for the liquidators.

Mr. *Cotton*, in reply:—

It would be adding a new clause to the *Companies Act* to hold that no mortgage of a company's property is valid until it is registered under the 43rd section; that is a directory clause, with a penalty for disobedience, and it in no way affects the validity of a charge as against the company. The unsecured creditors can only stand in the same position as the company.

SIR R. MALINS, V.C.:—

This summons raises a question of great importance. The facts are very simple. This colliery was worked originally by a partnership; in 1865 the partnership was converted into a joint stock company, which worked the colliery until 1869, when it was stopped by the coal mine being drowned out. The company is insolvent; it has incurred a debt to its bankers, the *North and South Wales Bank*, of £2500. It is avowed, as I understand, that the bank,

(1) 17 W. R. 514.

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having the suretyship of the directors of the company, are perfectly safe, and that they are making this claim indirectly for the benefit of the directors. Consequently this is in substance, though not in form, the claim of the directors as against the general creditors of the company, to have the security of all the property of the company for the debt of the company, which they, as sureties, are liable to pay to the bank. Before the formation of the company, the lease of the coal mine was deposited with the bank as security for the current account of the then owners of the mine, and when the company was formed and the mine was assigned to them, the lease was allowed by the directors to remain with the bank. I consider this to have been equivalent to a re-deposit of the lease by the company—an equitable mortgage created by the company. In this state of things the directors, being desirous that the company should pay off all its debts—though it does not seem to have been a great object to pay off the debt due to the bank, who were not pressing for payment or importuning the company either in 1868 or 1869, and are now satisfied with the security of the directors—called a meeting to authorize the raising of money for that purpose. The meeting was held, in pursuance of this notice, on the 17th of June, 1868, and was attended by the requisite number of shareholders, and the resolutions were then passed, upon which the bank, or rather substantially the directors, rely. [His Honour read the resolutions, and continued:—] On behalf of the claimants, it is contended that it was immaterial whether or not a security was given to the bank, because unquestionably the resolution authorized the raising of money by mortgage for the purpose of paying the debt of the bank, and if the money had been raised the bank would have been paid off, and whoever advanced the money would have had a mortgage of the property of the company; and the bank are, by the terms of the resolution, to stand in the same position, as if the liabilities of the company to them had been loans authorized and secured by mortgage.

There is some force in this argument. But what is the meaning of the last part of the resolution? It authorizes and confirms the acts of the directors. What had been the acts of the directors? They had deposited the lease with the bank by way of equitable mortgage, and as this had been done without the sanction of a

resolution of the company, as required by the 24th clause of the articles of association, the mortgage was invalid. Therefore the reasonable construction of this part of the resolution is, that it was intended to confirm and give validity to this invalid security.

No communication, however, is alleged to have taken place on the subject between the bank and the company, and I cannot find that the bank in any way acted on the faith of this resolution having given them a mortgage of the property of the company. I am therefore of opinion that the bank cannot stand as mortgagees by virtue of this resolution.

But can the directors stand as mortgagees? I think that it is a fatal objection to any such claim on their part, that they have omitted to register their mortgage or charge in the register of mortgages, which they were required by the 43rd section of the *Companies Act*, 1862, to keep. The object of that section is, that a person who is about to have any dealings with a limited company may go and inspect the register of mortgages and charges; if he finds the property of the company heavily incumbered, he will probably not have any dealings with them, but if he finds no mortgage or charge registered, he deals with the company as the owners of unincumbered property. It is not necessary that I should go into the question, whether a mortgagee of the property of a company, who does not see that his mortgage is registered, is entitled to set up the mortgage against the unsecured creditors. In this case the mortgagees are the directors, who have committed an illegal act by not registering the mortgage, and, upon the strict construction of the language of the Act, I think that they are precluded from setting up the mortgage. But, independently of the language of the Act, I am of opinion that, upon general principles, it cannot be permitted that directors, who get a charge on the property of the company, and omit to register it, but keep it as a pocket security concealed from the creditors, should set it up against the general creditors. I think, therefore, that there has been on the part of these directors such a degree of negligence that I cannot allow them to stand as mortgagees under these resolutions. As regards the costs, the rule is that the party who requires a summons to be adjourned into Court does so at the peril of costs. But in this case I think that it was a fair question

V.-C. M. 1870 *In re* Wynn Hall Coal Co. *Ex parte* North and South Wales Bank.

to be argued in Court, and I may, therefore, order the costs of all parties to be paid out of the estate.

Solicitors for the Claimants: Messrs. *Dean & Taylor.*
Solicitors for the Creditors: Messrs. *Abbott, Jenkins, & Abbott.*
Solicitor for the Liquidators: Mr. *W. Raimondi.*

V.-C. M. 1870 *June* 14, 15, 16.

RUSHTON *v.* CRAWLEY.

Patent—Use of new Materials to produce a known Article.

The Plaintiff obtained a patent for the use of animal fibre, by preference Russian wool, or wool of a coarse texture, in the manufacture of artificial hair to be made up as ladies' head-dresses, and for upholstery, and other like purposes. Upon bill filed to restrain an infringement of the patent:—

Held, that the specification was too extensive; that even the use of a new material to produce a known article could not be the subject of a patent unless some invention and ingenuity were displayed in the adaptation; that in this case a prior user of wool for the same purpose was proved by the evidence, and that the bill must be dismissed with costs.

THIS bill was filed by *Henry Rushton*, a chignon and frizette manufacturer, for an injunction to restrain the Defendants, Messrs. *Crawley & Son*, from infringing a patent obtained by the Plaintiff on the 24th of June, 1867, for an invention and improvement in the manufacture of artificial hair for ladies' head-dresses and frizettes.

The Plaintiff's patent contained the following specification:—

"This invention relates to the manufacture of hair to be used in imitation of human hair for head-dresses and the like, and for other purposes for which ordinary and curled hair are required. For these purposes I take animal fibre, by preference Russian wool, or wool of a coarse texture, and steep it in a bath of sulphate of copper from ten to fifteen hours to cleanse it, and separate the oleaginous matter therefrom. The wool, or fibre, when thus treated, is to be next boiled for a period of from one to two hours in a solution of catechu, or liquid prepared by adding and dissolving therein catechu in greater or less quantities according to the depth of shade required; sulphate of iron is to be then added to the liquid last

described as a dye, or to fix the colour when red or brown is desired, the quantity of the sulphate being also varied according to the depth of shade necessary":—[The Plaintiff then described another preparatory method of treating the wool for dyeing it black.] 'The fibre is then to be taken out, dried, and carded for use, the fibre being craped, or formed into rolls, frizettes, and the like, or used as curled hair for stuffing articles of furniture, upholstery, or other like purposes; the long fibre being separated and used for artificial hair, which may be made up in any required form, plain, curled, or dressed":—[The Plaintiff then described the crisping or curling process by which the wool or fibre was rendered elastic for upholstery and other like purposes.] "The curled hair thus produced may, if desired, be mixed with any other fibres for the purposes here mentioned, or for those analogous thereto. I claim the use and application of wool, particularly that kind known as Russian tops, or other similar wools or fibre, in the manufacture of artificial hair, in the imitation of human hair, and also in the manufacture of crisped or curled hair for furniture, upholstery, and other like purposes."

The bill alleged that the Plaintiff was the first inventor of this "Improvement in the manufacture of artificial hair," and that the invention was new and useful, and possessed great advantages over all methods formerly practised for the purpose; that the invention had obtained great notoriety among hairdressers and hair merchants, and the Plaintiff had derived large profits from the sale thereof. That the Defendants were manufacturing such artificial hair as aforesaid, and had sold large quantities of the same to their customers.

The Defendants, by their answer, alleged that the Plaintiff's method of manufacturing artificial hair had its origin with themselves, that they had used Russian wool for these manufactures previously to and in the year 1864, that the process by which the Plaintiff made such materials into frizettes and other artificial head-dresses was not new, and that the materials mentioned in the patent had been for many years employed for dolls' hair as a substitute for human hair.

The Plaintiff's evidence supported the case made by the bill.

It appeared that the Plaintiff had taken out a patent for the

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manufacture of artificial hair from mohair, or goat's hair, which had since been abandoned. It further appeared that "Russian tops" was a name given to Russian wool of a coarse description, the long pieces of the fibre being combed out and separated from the rest, and then designated as "wool tops."

Mr. *Glasse*, Q.C., Mr. *Webster*, Q.C., and Mr. *Russell Roberts*, for the Plaintiff:—

The Plaintiff by his specification claims the application of a known article of common use to a new purpose, which constitutes a good ground for a patent. The rule is laid down in *Carpmael* on Patents (1), in the following terms:—"The application of a known substance or material to a new purpose, and also the application of old machines in manufactures to which they have not before been applied, when a beneficial result is obtained, is the subject of a patent." It is also stated in *Coryton's* Treatise on Patents (2), "the application of a known substance or material to a new purpose, when there requires art to adapt it, is the subject of a patent." This invention precisely coincides with these rules. When the fashion arose among ladies of increasing the bulk of their natural hair, it was found that human hair was a very expensive luxury, and consequently means were adopted of reducing the price of artificial head-dresses. At first horse hair was used, but this article was found insufficient for the purpose. Then mohair, or goat's hair, was employed, and the Plaintiff took out a patent in 1865 for the adaptation of that material to ladies' head-dresses, but still the mohair, though soft and glossy, was found not to have sufficient consistency. The Plaintiff then discovered that Russian wool, which is a coarser description of wool, was the best article that could be used, and the extensive sale of head-dresses manufactured from this material proves its usefulness and good qualities for the purpose.

In the case of *Crane* v. *Price* (3) a patent was supported for combining the hot blast with the use of anthracite coal in the manufacture of iron. In *Derosne* v. *Fairie* (4) it was held that there could be a patent for filtering syrups of sugar through

(1) Page 27.
(2) Page 58.
(3) 4 Man. & G. 580.
(4) 1 Gale, 109.

charcoal, although it was notorious to everyone that at the date of the patent almost every conceivable liquid, except syrup, had been filtered through charcoal. Again, in *Bolton* v. *Bull* (1) a patent was sustained for applying a wooden covering to a steam cylinder, to keep in the heat; and in *Elliot* v. *Aston* (2) a patent for using known fabrics by known means producing a known manufacture was held to be good.

[They also referred to *Brook* v. *Aston* (3), *Harwood* v. *Great Northern Railway Company* (4), and *Fox* v. *Dellestable* (5), and distinguished them from the present case.]

Mr. *Grove*, Q.C., Mr. *Aston*, and Mr. *A. E. Miller*, for the Defendants:—

The Plaintiff's specification is far too extensive, and the patent cannot be sustained. The claim is not only for the use of Russian wool in the manufacture of ladies' head-dresses, but it is for every other purpose for which ordinary and curled hair are required, and he not only claims Russian wool, or wool of a coarse texture, but any animal fibre, though he prefers Russian wool. To support this patent the Plaintiff must shew that it is valid for all the purposes claimed. But he claims a patent also for the use of wool in stuffing furniture, when it is well known that the material has been always used for that purpose. The patent, therefore, is for the application of every species of fibre for every kind of purpose. A man has no right to embarrass the public and to hamper trade by claiming in his patent more than he is entitled to use. It is admitted that the process set out in the specification for dyeing the wool has been used at all times for the same purpose. If the claim is for common wool and every other fibre the patent is bad; if it is for Russian tops only, then the specification extends beyond what is claimed. The cases of *Brook* v. *Aston*, *Harwood* v. *Great Northern Railway Company*, and *Fox* v. *Dellestable*, are all authorities opposed to the Plaintiff's claim. In *Brook* v. *Aston* the claim was for burnishing and hardening the surface of fibre which had been previously swelled and enlarged, and it was held that

(1) 3 Ves. 140.
(2) 1 Webst. Pat. Cas. 222.
(3) 8 E. & B. 478.
(4) 11 H. L. C. 654.
(5) 15 W. R. 194.

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the specification was bad, as it claimed what was merely the application of old machinery in an old manner to an analogous subject, and that this could not be the subject of a patent, and it was therefore invalid. In *Harwood* v. *Great Northern Railway Company* (1) it was held that a slight difference in the mode of application was not sufficient to support a patent; nor would it be sufficient to take a well known mechanical contrivance and apply it to a subject to which it had not before been applied; and in *Fox* v. *Dellestable* (2) the rule was laid down by this Court that an invention which was neither novel nor important could not be the subject of a patent. *Jordan* v. *Moore* (3) is also an authority in opposition to the Plaintiff's claim, where it was decided that the combination of iron and timber in the construction of ships, being already well known and commonly used, a patent for a peculiar combination of these two materials could not be maintained; and in *Brunton* v. *Hawkes* (4) a patent for the construction of anchors was held to be bad on similar grounds. To support a patent for the application of a known substance or material to a known purpose, it must be shewn that skill and ingenuity have been employed in the adaptation.

Upon the subject of prior user, we shall shew from the evidence that horse hair, mohair, and wool, were all used in the fabrication of artificial hair before the date of this patent.

The Defendants' witnesses were then cross-examined in Court, and having proved distinctly that these different articles had been used by the Defendants themselves and by other persons in the trade long before the patent was obtained,

Mr. *Glasse* said it would be useless in the face of this evidence to contend any longer that there had not been a prior user of Russian wool in the manufacture of the articles in question.

SIR R. MALINS, V.C. :—

This case has occupied considerable time, and it raises some questions of great importance on the patent law as affecting mercantile interests. I do not think I should be justified in simply

(1) 11 H. L. C. 654.
(2) 15 W. R. 194.
(3) Law Rep. 1 C. P. 624.
(4) 4 B. & A. 541.

dismissing the bill without stating my reasons, because, while on the one hand it is of the highest importance, in the present state of the law, that patent rights should be preserved and protected for those who introduce really valuable inventions and improvements, on the other hand, it is equally important to the public that they should not be hampered by persons taking out patents for frivolous articles; patents for things which are not properly the subject of a patent, but merely for the employment of a different material, in order to produce the same result.

This patent is, in my opinion, so vicious in every point of view that I should not have heard the Defendants' case, but that I thought, upon the whole, it would be more satisfactory, not only to myself, but to the administration of justice, that the case should fail both upon technical grounds and upon the ground of prior user if there was sufficient evidence of the fact.

Now, upon the Plaintiff's case, I agree with the rule stated and laid down by Mr. *Grove* in his opening for the defence, that the public must be told in very distinct language in every specification what are the articles they may use and what they may not use. Therefore, if a man makes a discovery, and, instead of limiting himself in his specification to that which properly is the discovery (if it be one), makes his specification too extensive, and claims more than he is entitled to claim, that is calculated to embarrass the public, and is, I apprehend, a fatal objection to the patent.

In this case the Plaintiff first took out a patent, in 1865, for the manufacture of chignons from mohair, but afterwards he or his assignees, finding the patent could not be sustained, very wisely allowed it to expire. Therefore, even if it had been properly the subject of a patent, it would have become the property of the public by the course which he, or those claiming under him, adopted.

Now I think it is perfectly clear, from the evidence, that this Plaintiff must have known that long before 1865 mohair, or wool from the Angola goat, had been extensively used in the manufacture of these articles. It is, therefore, an instance of a man who endeavours to get an advantage of the public in general by taking out a patent; for there is a considerable portion of the public

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who are very much alarmed by the claims of patentees, and would rather submit to those claims than be exposed to a troublesome and expensive litigation. The particular kind of wool he has selected for his present patent is Russian tops. It is attempted to be made out that he claims a patent only for Russian tops, but it is distinctly proved in evidence that Russian wool, or "Russian tops," as they are called, is nothing more than the lowest class of wool. What he claims is, "the use and application of wool;" that is, of all kinds of wool, "and particularly that kind known as Russian tops, or other similar wools or fibre, in the manufacture of artificial hair in imitation of human hair." And not only does he claim it for that purpose, but also for the "manufacture of crisped or curled hair for furniture, upholstery, and other like purposes."

If any validity can be given to this patent, wool cannot be used without the consent of the Plaintiff for any of the purposes for which it has been used long before any man in this Court was born, or his grandfather before him. Here he makes an exclusive claim to the use and application of wool. The witnesses, in cross-examination, have proved beyond doubt that it has been the common course of the trade to make these things from wool of all kinds for certainly the last fourteen or fifteen years.

Now, can anything be more unjustifiable, under these circumstances, than that a man, because he introduces what he thinks is a new article, is, without inquiry, to rush to the Patent Office and take out a patent, and make an extensive specification, and thereby embarrass the conduct of trade, so that these gentlemen, the Defendants, find themselves interrupted in the course of their business by a bill filed against them, and are dragged into the Court of Chancery, and put to very considerable expense, and all because the Plaintiff has chosen to speculate upon the forbearance of the public, and has taken out a patent for that which is not properly the subject of a patent, and which was in common use long before he was born?

I cannot part with the case without expressing my opinion that this is not the subject of a patent at all. It is a gross violation of the privilege conferred upon inventors for a person to take out a patent for a known article which has been used for years, because he finds he can produce a thing cheaper or better by a new material,

or to suppose that directly he uses the new material it can be a subject for a patent. Suppose any one should discover some other well known material for making these things, such as paper, is he to take out a patent for it? and afterwards some one else should find out they could be made of straw, is he also to have a patent? So far as my opinion goes, and I desire it to be distinctly understood, the use of a new material to produce a known article is not the subject of a patent, but there must be some invention, something really new, something more valuable to the public than the simple use of a new material to produce a known article.

I do not think it necessary to go through the various authorities which were cited. The case of *Crane* v. *Price* (1) was a patent for the use of anthracite coal. The patent was established, but it is now generally considered that such a case would not succeed in the present day. The case of *Brook* v. *Aston* (2) is conclusive against the Plaintiff. That was a patent for simply using some machinery for wool which had been previously used for linen, yarn, or cotton. That, therefore, was using the same thing for a new material; this is using a new material for an old thing, according to the statement of the Plaintiff. But it turns out from the evidence that it is not a new material, but a perfectly old material. Assuming, however, that it was new, and that wool had never been used before for making these articles, upon that assumption, in my opinion, the patent would be wholly void.

Therefore, upon every ground, this case entirely fails. I think the Plaintiff's conduct wholly unjustifiable in dragging the Defendants before the Court. The only justice I can do them is to dismiss this bill, and to dismiss it with costs.

Solicitor for the Plaintiff: Mr. *Alderson Turner*.

Solicitors for the Defendants: Messrs. *Venning, Robins, & Venning*.

(1) 4 Man & G. 580.

(2) 8 E. & B. 478.

V.-C. M.
1870
July 15.

In re GRAHAM.

Infant—Ward of Court—Order for Maintenance without Suit.

An order for the maintenance of an infant made without suit constitutes the infant a ward of Court.

THIS was a Petition by Miss *Graham*, an infant, by her testamentary guardian, for the sanction of the Court to her proposed marriage.

The Petitioner was entitled to a legacy of £20,000 under her father's will, and an order had been made in Chambers, upon a summons taken out in the name of the Petitioner by her guardian, for the application of £500 a year out of the income of the legacy for her maintenance.

The Petition was presented on account of a doubt whether the order for maintenance had constituted the Petitioner a ward of Court.

Mr. *Glasse*, Q.C., and Mr. *Maidlow*, for the Petitioner:—

It is submitted that the Petitioner is not a ward of Court, and that no order should be made. In order to constitute an infant a ward of Court a bill must be filed, or that must be done which by statute is made equivalent to the filing of a bill. The question was considered in *In re Hodge's Settlement* (1), where an infant's fund had been paid into Court under the *Trustee Relief Act*, and an order had been made under that Act for the application of part of the income for the infant's maintenance, and there had also been an order for maintenance made on summons in Chambers. There the Vice-Chancellor doubted whether the infant was a ward of Court, and the Court of Appeal held that she was a ward of Court, on the ground that the effect of the Act was to put the parties in the same position as if a bill had been filed, but did not express any opinion as to any question except that arising on the *Trustee Relief Act*. Orders for maintenance out of the income of an infant's legacy paid into Court under the *Legacy Duty Act*, or of purchase-

(1) 3 K. & J. 213.

money belonging to an infant paid into Court under the *Lands Clauses Act*, do not make the infant a ward of Court: *In re Hillary* (1); *Ex parte Brewer* (2). No authority can be found which decides that an order for maintenance without suit constitutes an infant a ward of Court, notwithstanding the great number of such orders which have been made.

V.-C. M. 1870 *In re* GRAHAM.

SIR R. MALINS, V.C., said that the question was not free from doubt, but he was of opinion that an order for maintenance brought the property of the infant, and, consequently, the person of the infant, under the protection of the Court for all purposes, and that the effect of it was to make the infant a ward of Court. He should therefore make the usual order for a reference to Chambers, to inquire as to the propriety of the proposed marriage, and to approve of a proper settlement.

Solicitor: Mr. *Perry Godfrey.*

In re PRYSE'S ESTATES.

V.-C. M. 1870 *July* 22.

Practice—Confirmation of Sales Act (25 & 26 *Vict. c.* 108)—*Service of Petition.*

A Petition under 25 & 26 Vict. c. 108, s. 2, by trustees of settled land with power of sale, exerciseable with the consent of the tenant for life, for leave to sell the land and minerals separately, need not be served on the beneficiaries entitled in remainder.

12 Eq 87
15 Eq 636
16 Eq 228
W.N. 1874 216
6 Ch D 104

THIS was a Petition under the 25 & 26 Vict. c. 108, s. 2, by the trustees of a settlement of real estate, which contained a power for the trustees to sell the settled estate with the consent of the tenant for life, for the sanction of this Court to enable them, with such consent, to dispose of the land and minerals separately. The Petition had been served on the tenant for life, but not on the beneficiaries entitled in remainder.

Mr. *Archibald Smith*, for the Petitioners, submitted that service on the remaindermen was unnecessary. It was stated in *Morgan's*

(1) 2 Dr. & Sm. 461. (2) 2 Dr. & Sm. 552.

V.-C. M. 1870 *In re* PRYSE'S ESTATES.

Chancery Acts and Orders (1), that the beneficiaries should be served, and *In re Brown* (2) was cited as an authority for that proposition, but in that case the beneficiaries had been served, so that it was unnecessary for the Court to decide the question.

SIR R. MALINS, V.C., held that service on the remaindermen was unnecessary, and made the order.

Solicitors: Messrs. *Boys & Tweedie.*

V.-C. M. 1870 *July* 23, 27.

In re HARRISON'S ESTATE.

Compulsory Purchase of Land—Purchase-money paid into Court—Costs of Payment out of Court to Person absolutely entitled—Costs not provided for by Act.

Under the compulsory powers of an Act of Parliament (7 Geo. 4, c. lvii.) a public body purchased part of a settled estate, and paid the purchase-money into the Court of Exchequer. The Act provided that money so paid in should be reinvested in the purchase of land, and that the public body should pay the expenses of all purchases to be made in pursuance of the Act:—

Held, that, although it was a matter transferred from the Court of Exchequer, the Court of Chancery had no power to order the public body to pay the costs of a Petition for the payment of the fund to persons who had become absolutely entitled to it.

In re Metford (3), *In re Mouseley's Trusts* (4), and *Ex parte Ecclesiastical Commissioners* (5), followed.

In re Robertson (6), and *In re Tiverton Market Act* (7), not followed.

THESE were two Petitions for the payment to the Petitioners of three-eighths of £1975 6*s.* 2*d.* consols, representing the purchase-money of land; part of the estates devised by the will of *John Harrison*, who died in 1807, which had been taken in 1828 by the Corporation of *Liverpool* for the purposes and under the compulsory powers of a local Act (7 Geo. 4, c. lvii.)

(1) 4th Ed. p. 260.
(2) 9 Jur. (N.S.) 349; 11 W. R. 19.
(3) 6 Ibid. 796.
(4) 4 K. & J. 86, n.
(5) 5 N. R. 483.
(6) 23 Beav. 423.
(7) 26 Beav. 239.

The 1st section of the Act empowered the corporation to purchase certain lands, and provided that "the expenses of such purchases, and all other expenses attendant upon the execution of the powers and authorities of this Act," should be defrayed out of the funds and estates of the corporation, except where otherwise provided for.

The 17th section provided, that the purchase-moneys payable to persons where lands were limited in strict or other settlement should be paid into the Court of Exchequer, and contained provisions for the application of such moneys similar to those in the *Lands Clauses Consolidation Act*, 1845, except that there was no provision for payment out to persons becoming absolutely entitled.

The 22nd section provided, that where, by reason of any disability or incapacity of the persons entitled to lands to be purchased under the authority of the Act, the purchase-money was required to be paid into Court, and to be applied in the purchase of other lands to be settled to the like uses in pursuance of the Act, the Court might order "the expenses of all purchases from time time to be made in pursuance of this Act, or so much of such expenses as to such Court shall seem reasonable, together with the necessary costs and charges of obtaining such order," to be paid by the corporation.

In 1828, the estates of *John Harrison* being settled under his will upon *James Harrison* for life, with remainders over, the purchase-money for the land taken by the corporation was paid into the Court of Exchequer, and orders were made by that Court for its investment in consols, and for payment of the dividends to the tenant for life of the estate, and the costs of obtaining those orders were ordered to be paid out of the fund.

Upon the hearing of the present Petitions inquiries were directed as to the persons entitled, and the result of the inquiries, and of a decision of Vice-Chancellor *Malins*, affirmed by Lord Justice *Giffard* (1), upon the construction of the will, was, that the two sets of Petitioners and *Mary Margaret Wheelhouse* were now absolutely entitled to three fourths of the fund in Court. The only

(1) Law Rep. 5 Ch. 408.

V.-C. M. 1870 *In re* HARRISON'S ESTATE.

question upon the present hearing was, whether the costs of the Petitions were to be paid by the corporation.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, and Mr. *Joshua Williams*, Q.C., and Mr. *Courtney*, for the Petitioners:—

First: Under the express words of the 1st section of the Act, the corporation must pay these costs as "expenses attendant on the execution of the powers and authorities of this Act."

Secondly: Assuming that the Act does not expressly provide for the payment of these costs by the corporation, yet this being a matter transferred from the Court of Exchequer, the Court will follow the practice of that Court, according to which the corporation would have been ordered to pay the costs: *In re Robertson* (1); *In re Tiverton Market Act* (2).

Mr. *Glasse*, Q.C., and Mr. *C. Hall*, for Mrs. *Wheelhouse*.

Mr. *North*, for the Corporation of *Liverpool*:—

The 1st section of the Act has nothing to do with the question; it simply provides that all the expenses which the corporation would incur in the execution of the powers of the Act should be defrayed out of the funds and estates of the corporation. If that section had been intended to throw upon the corporation the costs of all applications under the Act, the special provision in the 22nd section, for the expenses of purchases of land to be made in pursuance of the Act, would have been unnecessary.

There is, therefore, no clause in the Act which empowers the Court to order the corporation to pay these costs, and in the absence of such a provision the Court has no jurisdiction to make such order: *Ex parte Molyneux* (3); *In re Strachan's Estate* (4); *In re Land's Trusts* (5); *In re Mouseley's Trusts* (6); *In re Gould* (7); *In re Metford* (8); *In re Musgrave* (9); *Ex parte Ecclesiastical Commissioners* (10). In three of those cases, viz.:

(1) 23 Beav. 433.
(2) 26 Ibid. 239.
(3) 2 Coll. 273.
(4) 9 Hare, 185.
(5) 4 K. & J. 81.
(6) 4 K. & J. 86, n.
(7) 24 Beav. 442.
(8) 6 Jur. (N. S.) 796.
(9) Ibid. 797.
(10) 5 N. R. 483.

In re Mouseley's Trusts (1); *In re Metford* (2); and *Ex parte Ecclesiastical Commissioners* (3), the fund had been originally paid into the Court of Exchequer, but the Vice-Chancellors *Wood*, *Kindersley*, and *Stuart*, declined to follow *In re Robertson* (4) and *In re Tiverton Market Act* (5). In the present case the Court of Exchequer did not make the corporation pay the costs of the Petition for interim investment and payment of dividends to the tenants for life. It is no hardship in this case upon the persons entitled to the fund that they should pay the costs; for, but for this Petition, a suit would have been necessary to ascertain the construction of the will, and if the fund in Court had been reinvested in land, as was contemplated by the Act, during the continuance of the life estates, the reinvestment could have been made without going into the question of the construction of the will, or ascertaining who were the persons entitled in remainder, and, consequently, would have involved much less expense than these Petitions. At all events, the corporation ought not to pay the costs of more than one petition, or the costs of the appeal from your Honour's decision upon the construction of the will.

Mr. *Cotton*, in reply:—

In re Metford was decided on the ground that it was not a matter pending in the Court of Exchequer at the time of the abolition of the equity jurisdiction of that Court. *In re Mouseley's Trusts* and *Ex parte Ecclesiastical Commissioners* are very shortly reported, and no reasons are given in the judgments for overruling the decisions of the Master of the Rolls. The two Petitions were necessary, the titles of the Petitioners being distinct: *In re Spooner's Estate* (6).

July 27. SIR R. MALINS, V.C.:—

These are Petitions to take money out of Court paid in by the Corporation of *Liverpool*, so long ago as 1828, for the purchase of

(1) 4 K. & J. 86, n.
(2) 6 Jur. (N. S.) 796.
(3) 5 N. R. 483.
(4) 23 Beav. 433.
(5) 26 Ibid. 239.
(6) 1 K. & J. 220.

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lands taken compulsorily by the corporation for the improvement of the town. The only question on which I reserved my judgment was as to the liability of the corporation to pay the costs of the Petitions.

The question depends upon the 1st and 22nd sections of the Act enabling the corporation to take the lands. The 1st section provides that the corporation may purchase lands, and that the expenses of such purchases, and all other expenses attendant upon the execution of the powers and authorities of the Act, shall be defrayed out of the funds and estates of the corporation, except where otherwise provided for; the 22nd section contains the common provision that where persons are under disability the money is to be invested, and that the corporation are to pay the expenses of obtaining an order for reinvesting the money in the purchase of other lands; but it is wholly silent upon the subject of who is to pay the expense of taking the money out of Court, if it is not desired that it should be invested in land.

The rule of the Court of Chancery in such cases is settled by the case of *Ex parte Molyneux* (1), in which Vice-Chancellor *Knight Bruce*, feeling himself bound by previous decisions, and deeply regretting that he was so bound, decided that, although the parties taking the land compulsorily were bound to pay the expense of taking the money out of Court and investing it in other lands, they were not bound to pay the expense of taking it out of Court without investing it in other lands. That was followed by the present Lord Chancellor in *In re Land's Trusts* (2). That was a case under an Act which was passed before the *Lands Clauses Act*, 1845, and the same question arose; the Lord Chancellor quite concurring in all that Vice-Chancellor *Knight Bruce* had said as to the ungracious character of the refusal of the company to pay the costs, when they might confessedly have been compelled to pay such far larger costs had the Petition been for a reinvestment in land, decided with extreme reluctance that he was bound by the cases, especially *Ex parte Molyneux*, to decide in their favour. Then in another case, reported in a note to *In re Land's Trusts*, the Lord Chancellor, after taking time to consider the case of *In re*

(1) 2 Coll. 273. (2) 4 K. & J. 81.

Robertson (1), which is an authority the other way, decided that he was bound by the authorities, especially *Ex parte Molyneux* (2), to hold that the Court had no power to order the company to pay the costs of an absolute transfer. *In re Gould* (3) is a decision of the Master of the Rolls to the same effect.

Now these cases thoroughly settle the practice of this Court, but it was contended on the part of the Petitioners, that as the money in this case was originally paid into the Court of Exchequer, and was transferred from the Court of Exchequer to this Court, the case was governed by the decision of the Master of the Rolls in *In re Robertson* and *In re Tiverton Market Act* (4). In the former case the Master of the Rolls, acknowledging the rule in this Court, said: "I am quite sure that it is equitable and proper that the public who compulsorily take the property should pay the costs. I do therefore think it is expedient to follow the practice of the Exchequer in this case, and I have the best means of knowing what the practice was, for I have the order made by that Court in this very matter." In *In re Tiverton Market Act*, Lord *Romilly* said: "I cannot see how the costs of investing the money in land differs from coming and taking the money itself." With those two decisions of the Master of the Rolls I entirely and heartily concur, and I should gladly have followed them if I had not been precluded from doing so by subsequent decisions. But the point came before Vice-Chancellor *Kindersley* in *In re Metford* (5), and he there decided that, although the money was originally paid into the Court of Exchequer, the company were not liable to pay the costs of the Petition to take it out of Court; and again in *In re Musgrave* (6) the same point was decided. The Vice-Chancellor there said: "On the whole I consider that the moral justice of the case is in favour of the Petitioner, viz., that the costs should be paid, and, if I were not limited by the Act, I should certainly make the company pay the costs of the application." The same question came before Vice-Chancellor *Stuart* in *Ex parte Ecclesiastical Commissioners* (7), and he decided that he could only charge those

(1) 23 Beav. 433. 3 Jur. N.S. 784
(2) 2 Coll. 273.
(3) 24 Beav. 442.
(4) 26 Beav. 239.
(5) 6 Jur. (N.S.) 796.
(6) Ibid. 797.
(7) 5 N. R. 483. 11 Jur. N.S. 481.

V.-C. M. 1870 *In re* HARRISON'S ESTATE.

companies with the costs of the Petition to take the money out of Court whose Acts expressly authorized the Court to charge them with such costs, and that he should not follow the practice of the Court of Exchequer as to money paid into that Court.

These authorities take it entirely out of my power to do that which, I repeat, I should gladly do, and which I think the justice of the case requires should be done. I am, therefore, upon the authorities, and only upon the authorities, bound to come to the conclusion that I cannot order the corporation to pay the costs. It is remarkable with regard to this series of authorities, extending over so many years, that not one of them has gone to the Court of Appeal. In *Ex parte Molyneux* (1) an appeal was advised, and the railway company paid the costs (2). I hope that if the parties cannot agree upon it this case may be taken to the Court of Appeal, and that the Court of Appeal will be able to reverse my decision as well as all the others I have cited. If the Petitioners, instead of taking the money out of Court had petitioned to have it taken out and reinvested in other land, the expense of taking it out, and the far greater expense of investigating the title and executing the conveyances, and all the expenses attending upon a purchase, must have been paid by the corporation. What a monstrous injustice it is, that if the parties who are entitled to have the money reinvested save the great expense of a reinvestment by taking it out of Court, I am not able to make the corporation pay the costs! I can only repeat that I am sorry that I cannot do it. The costs, therefore, must come out of the fund.

Mr. *Glasse* submitted that the corporation might be ordered to pay the costs of the inquiry for the purpose of ascertaining who were entitled to the fund, and cited *In re Singleton's Estate* (3).

Mr. *North*:—That was a case under the *Lands Clauses Act*, and it simply decided that the costs of such an inquiry are part of the costs of getting the fund out of Court.

SIR R. MALINS, V.C.:—I am afraid I have no power to give any costs.

(1) 2 Coll. 273. (2) 23 Beav. 434.
(3) 9 Jur. (N.S.) 941.

Mr. *North* then asked that the corporation might have their costs out of the fund.

SIR R. MALINS, V.C. :—I cannot give these costs.

Solicitors for the Petitioners: Messrs. *Singleton & Tattershall;* Messrs. *Ewbank & Partington.*

Solicitors for the Respondents: Messrs. *Chester & Urquhart;* Mr. *Travers Burges.*

WHITING *v.* BURKE.

Co-Sureties—Sureties by separate Instruments.

A bond was executed by a principal and two sureties. One of the sureties compounded with his creditors, and by the terms of the bond the moneys secured became immediately payable. After this the Plaintiff entered into a separate bond to become liable for the whole amount; and upon the principal becoming insolvent, the creditor sued the Plaintiff and obtained payment of the amount due. The Plaintiff filed his bill against the other surety in the first bond for contribution:—

Held, upon the parol evidence (which the Court considered to be admissible), that a co-suretyship was intended by the parties; but that even if the Defendant had not known of the Plaintiff's suretyship, the Plaintiff would still have been entitled to contribution as against him.

ON the 28th of September, 1866, *Arthur Crux*, as principal, and *Theodore Crux* and *W. H. Burke*, as sureties, executed a bond to the *Protector Endowment Loan and Annuity Company*, in the sum of £800, to secure the repayment of certain sums of money in the bond mentioned, by quarterly instalments of £33 5*s.* each, the last of such payments becoming due in September, 1870. And the obligors covenanted with the company that, if any of the quarterly payments should be in arrear, or in any of the events indorsed upon the bond, not only any quarterly sum of £33 5*s.*, which might then have become due, but all sums of like amount which would have become due if the principal had outlived the 28th day of September, 1870, and such day had actually arrived, should immediately become payable; and that payment of such sums of £33 5*s.*, or any or either of them, might be enforced at the discretion of the company. And the sureties to the said bond covenanted

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with the company that they, or either of them, should not be released or discharged from the bond by any arrangement which might, either with or without the assent, and notwithstanding the dissent, of the sureties, be made between the principal and the company, either for extension or alteration of time of payment, or for additional security, or by any other dealing or transaction which should take place between the principal and the company. One of the events endorsed upon the bond was, if the obligors, or either of them, should, while any moneys remained payable on the bond, be declared a bankrupt, or make any composition for the benefit of their creditors.

In the month of August, 1866, *Theodore Crux* executed a deed of composition with his creditors, whereby he covenanted to pay them 2*s.* in the pound in discharge of their debts.

Upon the failure of *Theodore Crux* as aforesaid, and in consequence of one of the instalments being in arrear, the *Protector Company* commenced proceedings against *Arthur Crux*, and before they would stop such proceedings required *Arthur Crux* to produce another surety in the place of *Theodore Crux;* and *Arthur Crux*, knowing that the Plaintiff, who was then about twenty-one years of age, was entitled to a considerable sum of money, applied to him to assist him in the matter and to become such surety. The Plaintiff consented to this request, and accordingly, on the 24th of August, 1868, he went, without taking any other advice, accompanied by *Arthur Crux*, to the *Protector Company*, and signed an undertaking, which recited that the quarterly sum of £33 5*s.* due on the 28th of June, 1868, was unpaid; and that, by reason of such non-payment, the whole of the remaining instalments had become immediately due, and had been demanded of *Arthur Crux* by virtue of the bond; and that proceedings had been commenced against *Arthur Crux* by the company for the recovery of £299 5*s.*, which the company had agreed to receive by nine instalments of £33 5*s.* each, according to the tenor of the bond, upon having the additional security of the Plaintiff's undertaking and guarantee; and the Plaintiff thereby undertook to pay the company the said sum of £299 5*s.* by nine quarterly instalments.

The Plaintiff stated that, after he had signed this undertaking, he was informed by the solicitor of the *Protector Company* that

the Plaintiff and the Defendant, *W. H. Burke*, were then jointly liable, although the Plaintiff had signed a separate deed.

On the 5th of December, 1868, *Arthur Crux* became bankrupt; and the Plaintiff alleged that, shortly afterwards, the Defendant *W. H. Burke* admitted that he was jointly liable to the *Protector Company*. This was denied by *Burke*.

In January, 1869, the *Protector Company* commenced proceedings at law against the Plaintiff for payment of the amount due upon the bond, and they recovered judgment, and obtained a charging order upon the Plaintiff's share of certain funds standing to his credit in this Court; and they subsequently received, by order of the Court, the sum of £383 16*s*., in satisfaction of all claims under the bond.

The Defendant *W. H. Burke* had since refused to pay his share of the amount so recovered against the Plaintiff. This bill was therefore filed against him, praying that he might be ordered to pay to the Plaintiff a moiety of the sum so recovered against the Plaintiff upon the bond, with interest; and that *J. H. Clarke*, another Defendant, who was the assignee of the estate and effects of *Arthur Crux*, might be ordered to pay to the Plaintiff the other moiety, and also to pay to the Defendant *W. H. Burke* the principal and interest directed to be paid by him to the Plaintiff.

Evidence was adduced on both sides as to the intention of the parties.

Mr. *Cotton*, Q.C., and Mr. *Everitt*, for the Plaintiff:—

The Plaintiff, by executing the bond of August, 1868, became co-surety with *Burke* for the payment of the money due from *Arthur Crux*, the principal, and this would have been the case whether *Burke* had been informed of the second bond or not; but the evidence which, according to the decision in *Craythorne* v. *Swinburne* (1), is admissible in such a case as this, proves that he did know of it. It is evident, from the whole of the circumstances, that it was the intention of all parties that the Plaintiff should stand as a co-surety, and, consequently, that he should be only liable for half the debt.

That the Plaintiff is only a co-surety is evident from the decision

(1) 14 Ves. 160.

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in *Hodgson* v. *Shaw* (1); and in *Dering* v. *Earl of Winchelsea* (2), where there were three sureties bound by different instruments, it was held that they were all liable to contribute, the doctrine of contribution not being founded on contract, but being the result of general equity on the ground of equality of burden and benefit.

So, in *Newton* v. *Chorlton* (3), it was held that a surety, on paying off the debt of the principal debtor, was entitled to require from the creditor the benefit, not only of the security from the debt which the creditor had at the time of the contract of suretyship, but also of all the securities which he might hold at the time he is paid off; and it was held, in *Pledge* v. *Buss* (4), that the rights of a surety with respect to securities extend to securities taken after the contract of suretyship. It is, therefore, now the settled law that a surety is entitled to the benefit of any security taken by the creditor; and the position of co-suretyship is established in this case. By the statute 19 & 20 Vict. c. 97, s. 5, it is enacted that every co-surety who discharges the liability shall be entitled to an assignment of all securities held by the debtor, and to recover from the principal debtor, or any co-surety, an indemnification for the advances made and loss sustained by such co-surety. The Plaintiff, therefore, is entitled to the benefit of the security taken from *Burke*, and to be indemnified by him to the extent of one-half the amount recovered under the bond.

Mr. *Glasse*, Q.C., and Mr. *Robinson*, for the Defendant *Burke*:—

The doctrine as to co-sureties does not apply in this case, since the relation of co-sureties did not exist between the parties. A man has no right to pay off another person's debts, and then sue him for what he has paid. The Plaintiff never intended to become a co-surety, but to be responsible for the whole of the debt. By the bond which he entered into he became surety for the debt without reference to *Burke*, and without communicating with him upon the subject. There was no agreement that the Plaintiff should be a co-surety, but it was a substantive contract that the Plaintiff, and the Plaintiff alone, would be liable for the debt. In the case of *Craythorne* v. *Swinburne* (5), although Lord *Eldon* approved of the

(1) 3 My. & K. 183.
(2) 1 Cox, 318.
(3) 10 Hare, 646.
(4) Joh. 663.
(5) 14 Ves. 160.

principle laid down in *Dering* v. *Earl of Winchelsea* (1), he held that it was a question of evidence whether a co-suretyship was to be inferred, and in that case he came to the conclusion that the person who entered into the separate bond without the privity of the other surety intended to give a distinct and separate security. A man may by contract place himself out of the reach of the principle, and in every case it is to be proved by the evidence whether the party has done so or not. This Plaintiff, having entered into a separate bond to pay the whole amount due, has no right to claim against the Defendant a contribution for a debt which he voluntarily and distinctively took upon himself in case of the failure of the principal to discharge it.

Mr. *Woodhouse*, for the Defendant *Clarke*, asked for his costs.

SIR R. MALINS, V.C.:—

The original bond was executed by *A. Crux*, as principal, and by *T. Crux* and *W. Burke* as sureties. *T. Crux* afterwards compounded with his creditors, and the effect of that transaction was that *Burke* became liable to pay the whole of the money due under the bond, and if he had been obliged to pay the amount, he would have been entitled to get it back from *A. Crux*, the principal. *Burke* was, however, entitled to the benefit of any further security which the *Protector Company* obtained from the principal debtor, and if the company afterwards recovered the amount from the principal, or from any further surety, then *Burke* would have been entitled to repayment from the company. In this state of things *Arthur Crux*, being in difficulties, met with the Plaintiff, and wishing to defer payment as long as he could, induced him to become a surety in the place of *Theodore Crux*. Accordingly, on the 24th of August, 1868, the Plaintiff went to the office of the company with *Arthur Crux* and signed the document set out in the bill, by which he undertook to pay the whole amount due. It is quite true that *Burke* was not a party to that undertaking, and it is not therefore upon the face of it a co-suretyship; but it is clear, from the case of *Craythorne* v. *Swinburne* (2), that the question of suretyship or not may be proved by parol evidence, and I

(1) 1 Cox, 318. (2) 14 Ves. 160.

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am therefore at liberty to look at the whole transaction for the purpose of deciding whether a co-suretyship was intended by the parties. The evidence upon that point is very contradictory; but, looking at the probabilities of the case, and at the affidavits on both sides, and seeing that *Burke* was at that very time liable for the whole amount, from which he could not escape, unless by obtaining another person to become a co-surety, I am satisfied that, although the undertaking by the Plaintiff is not in the form of a co-suretyship, there was nothing more than a co-suretyship intended by the parties.

In the case of *Dering* v. *Earl of Winchelsea* (1) three parties became liable for the performance of a bond, and all executed different instruments, and there was no evidence to shew that any one of them knew that the other was liable, and yet it was held that they were all liable to contribute the same as if joined in one instrument. That case is referred to by Lord *Eldon* in *Craythorne* v. *Swinburne*, and that learned Judge gives full sanction to the principle there laid down, for he says (2): "If the relation of surety for the debtor is formed, and the fact is that the party becomes surety for both the principal debtor and another surety, not for the principal alone, it is decided, that whether they are bound by several instruments, or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases, upon the maxim that equality is equity; the creditor who can call upon all shall not be at liberty to fix one with payment of the whole debt; and upon the principle requiring him to do justice, if he will not, the Court will do it for him." So that in this case, if *Whiting* had signed the undertaking even without the knowledge of *Burke*, that would not have raised any distinction. I am therefore of opinion that if, on the original transaction, the Plaintiff had by a separate instrument, and at a different time, agreed to become liable, he would still have been only a co-surety.

Now, on the 24th of August, the debt having become due, it is said that this ill-advised young man took upon himself the obligation to pay the whole of the debt; but upon the evidence I am satisfied the intention was that he should be liable only to a moiety

(1) 1 Cox. 318. (2) 14 Ves. 165.

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jointly with *Burke*, and that that was the effect of the contract entered into by him.

I think, under the circumstances, it is much to be regretted that *Burke*, instead of consenting at once to pay half of the debt, should have resisted a request which was so obviously consistent with the justice of the case, and that he should have obliged the Plaintiff to institute these expensive proceedings to recover the amount. My opinion, therefore, is that, as between the Plaintiff and the Defendant *Burke*, the Plaintiff has established his claim, and the Defendant is bound to pay half the amount which the Plaintiff has had to pay to the company, and he must also pay the Plaintiff his costs of the suit.

As to the question whether the Defendant *Clarke*, the assignee of *Arthur Crux*, is a necessary party to the suit, my impression is that he should not have been made a party; but I think the justice of the case will be met by giving no costs as regards *Clarke*.

Solicitors for the Plaintiff: Messrs. *Algernon Wells & Sykes.*

Solicitors for the Defendant *Burke:* Messrs. *James, Curtis, & James.*

Solicitor for the Defendant *Clarke:* Mr. *Wickens.*

FORREST *v.* PRESCOTT.

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July 27.

Charge of Debts on Real Estate—Exoneration of Personal Estate.

A testatrix gave her real estate in trust for her two daughters, *I. McCarty* and *M. Streffi*, for life, and afterwards each moiety to go to the sons of each of her daughters and their families; and after giving various legacies, she left the residue of her estate to her granddaughters. By a codicil, the testatrix directed that certain debts incurred by her for her son-in-law *J. McCarty* should be exclusively, and in the first instance, borne by and paid out of the *McCarty* moiety of her real estate, exempting the *Streffi* moiety from payment of such debts:—

Held, that the codicil amounted to an express exoneration of the personal estate of the testatrix; and that the moiety of her real estate devised to the *McCarty* family was primarily liable to the debts.

THIS was a special case, stated for the opinion of the Court.

Lydia Faulkiner, by her will, dated the 14th of June, 1836, gave

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certain real estates to trustees upon trust, for the separate use of her daughters, *Isabella McCarty* and *Mary Streffi*, during their lives, as tenants in common; and after the decease of her daughter *Isabella McCarty*, then as to one moiety of the said estates in trust for her grandsons *Justin* and *Frederick Caleb McCarty*, two sons of *Isabella McCarty*, as tenants in common, with limitations in favour of their first and other sons; and in case of the death of either of them without issue, then in trust for other members of the *McCarty* family; and as to the other moiety of the said estates, from and after the death of *Mary Streffi*, in trust for *Robert Prescott*, a son of *Mary Streffi*, for life; and afterwards for his first and other sons in tail, with ultimate limitations to the *McCarty* family.

She then gave legacies to each of the six daughters of *Isabella McCarty*, amounting in the whole to £5000; and to *Lydia Prescott* and *Robert Prescott*, the children of *Mary Streffi*, £1000 each: and the residue of her property she gave to five of her granddaughters, the children of Mrs. *McCarty*, and appointed *Robert McCarty* and *Robert Prescott* executors of her will.

The testatrix, by a codicil to her will, dated the 8th of April, 1837, after reciting that she had become surety for her son-in-law *Justin McCarty* in four several bonds, for securing in the aggregate the sum of £3976, continued in the following terms:—"Now, it is my will, desire, and direction that in case the same shall not be discharged by my said son-in-law *Justin McCarty*, his heirs, executors, or administrators, that sum, and all interest due thereon, shall be exclusively and in the first instance borne by and paid out of the rents, issues, and profits of the moiety of my said real estates devised by my said will to my daughter *Isabella McCarty* and her sons *Justin McCarty* and *Caleb Frederick McCarty*, and their issue; it being my intention and will, and I hereby declare and direct, that the other moiety of my said real estates devised by my said will to my daughter *Mary Streffi* and her son *Robert Prescott* shall be exempt from payment of the said debt so due by me for the accommodation of my said son-in-law *Justin McCarty*. And I further direct that, in case the said sum or any part thereof, or of the interest thereof, shall be levied or paid out of the said moiety of my said real estates devised by my said will to my daughter

Mary Streffi and *Robert Prescott*, then, and in such case, that the amount so levied or paid shall be raised and repaid out of the said moiety so devised to my daughter *Isabella McCarty* and my grandsons *Justin McCarty* and *Frederick Caleb McCarty*, and their issue, it being my first wish and intention that my said daughter *Mary Streffi* and her son *Robert Prescott* should have, take, and enjoy the said moiety of my said estates, free from and absolutely discharged of the said several and respective debts."

The testatrix died in April, 1837, at which time *Justin McCarty*, the son-in-law, was insolvent, and some few years after her death all his assets were realized at the suit of the creditors, and applied in part payment of his debts. He died in September, 1864, intestate, and two of the debts referred to in the codicil of the testatrix, amounting to £2000 and £1752, were still owing. Since the death of *Justin McCarty* a sum of £1833 had been paid to the executors of the testatrix, and had been invested in £2292 consols, which now formed part of her personal estate.

It was submitted by the Plaintiffs, the representatives of the granddaughters of the testatrix, who were legatees under her will, that this sum of £2292 consols was not applicable to the payment of the before-mentioned debts, but ought to be distributed among the legatees and their representatives rateably. The Defendants, the executors, were, however, advised that it was doubtful whether the directions in the codicil were sufficient to exonerate the personal estate of the testatrix from payment of these debts, and to charge the same (to the relief of the personal estate) on the moiety of her real estate devised in trust for the said *Isabella McCarty* and her issue; and the Defendants, who were now in possession of the said moiety of the estate, insisted that the directions were not sufficient for that purpose.

It was admitted on all hands that the moiety devised in trust for *Mary Streffi* and her issue was, as between it and the personal estate, exonerated from payment of these debts.

Mr. *Cotton*, Q.C., and Mr. *Kekewich* for the Plaintiffs:—

The bond debts are directed by the codicil to be paid exclusively out of the moiety of the real estate given to the *McCarty* family; and the words of the codicil, that these debts are to be paid and

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borne exclusively and in the first instance out of the rents, issues, and profits of a certain portion of the real estate, are equivalent to an express exoneration of the personal estate.

Mr. *Pearson*, Q.C., and Mr. *Wright*, for the Defendants:—

The personal estate is primarily liable to the payment of these debts. The testatrix, no doubt, intended to exclude the *Streffi* moiety of the real estate from liability in respect of the bond debts, and the terms of the codicil are directed to that especial purpose, but she did not intend to exonerate the personal estate; all she meant was, that if it was necessary to resort to the real estate, then the *McCarty* moiety of that estate was to be liable instead of the *Streffi* moiety. The testatrix evidently intended to preserve the real estate for her two daughters and their descendants, and desired that the debts which had arisen through her son-in-law *Justin McCarty* should rather fall upon the *McCarty* family than upon the *Streffi* family. The clause points only to the protection of one moiety as between the two moieties, but there is no evidence that she intended to exonerate the personal estate. It is not probable that she intended to take from her own daughter and the male branch of the *McCarty* family a considerable portion of the real estate which she had settled upon them in order to benefit her granddaughters of that family. The law is settled that without words expressly exonerating the personal estate that estate will be primarily liable. This was laid down in *Collis* v. *Robins* (1); and *Bootle* v. *Blundell* (2).

Mr. *Cotton*, in reply:—

The meaning of the testatrix is sufficiently shewn by the words "exclusively and in the first instance;" and the fact that she had another object in view, which was to save one moiety of the real estate and throw the debts upon the other moiety, will not prevent the Court from giving effect to that express direction. If she had said, "all my debts are to be paid exclusively out of my real estate," that would have been sufficient to exonerate her personal estate.

(1) 1 De G. & Sm. 131, 142. (2) 1 Mer. 193, 220.

SIR R. MALINS, V.C.:—

The scheme of this will is to make a complete division of the real estate between the families of the testatrix's two daughters. Then, by her codicil, she recites the liability she had incurred for the debts, not of herself, but of her son-in-law, *Justin McCarty;* and there is nothing more probable than that she should intend those debts to be paid out of that estate which she had given to the *McCarty* family. It is said on the one side that the object expressed in the codicil is, as between the two moieties of the real estate—if the real estate is resorted to at all—to throw the charge of these debts upon the *McCarty* moiety, but not to do so to the exoneration of the personal estate. On the other hand it is said, and I think correctly, that the object of the testatrix was to make the moiety of her real estates given to the *McCarty* family exclusively the fund for the payment of these debts. With regard to the general principle there is no question whatever, that wherever there are debts, in order to exonerate the personal estate, there must not only be an intention to charge the real estate, but a clear intention to exonerate the personal estate. But I take it to be quite clear that if a testator says, "I direct my debts to be paid exclusively out of my personal estate," that is an exoneration of the real estate. If he says, "I direct my debts to be paid exclusively out of real estate," that is an exoneration of the personal estate. So, if he says, "my debts are to be paid out of a particular portion of my real estate," that is an exoneration not only of the personal estate but of all other parts of the real estate. Now, it being the probable intention of the testatrix that, out of that part of her property given to the *McCarty* family the debt she incurred for the benefit of that branch of the family should be paid, she directs, "the same shall be exclusively and in the first instance borne by and paid out of the rents, issues, and profits of the moiety of my said real estates devised" to the *McCarty* family. I think that means "my personal estate is not to pay it at all, but it is to be paid out of my real estate." So far as the *McCarty* moiety would be sufficient, it is to be paid exclusively out of that, to the exoneration of the other moiety given to Mrs. *Streffi*, and so as to exonerate the personal estate from the payment.

I am, therefore, of opinion that the sum of £2292, which, I am

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told, would be applicable to the payment of legacies, is to be so applied, and not to the payment of the debts.

Solicitors for the Plaintiffs: Messrs. *Freshfield.*
Solicitors for the Defendants: Messrs. *R. M. & F. Lowe.*

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FERRIER *v.* JAY.

Special Power of Appointment—Payment of Debts.

A testatrix having a general power to appoint £500, and a special power to appoint the residue of certain property, gave all her real and personal estate whatsoever and wheresoever, and of which she had any power to appoint or dispose of, to trustees, in the first place to pay her debts, funeral and testamentary expenses, and then to divide the residue between the objects of the special power:—

Held, that the special power was well executed.

Clogstoun v. *Walcott* (1) not followed.

THIS was a special case.

Richard Ferrier, by his will, dated the 2nd of November, 1864, devised and bequeathed his real and personal estate to trustees to sell and divide the proceeds amongst his children, with a proviso as to the shares given to his daughters that the trustees should hold the same, in default of their having children, upon trust to raise the sum of £500 for the benefit of such persons and in such manner as each of his daughters should by will or codicil appoint, and to stand possessed of the residue of such share "upon trust for all or any one or more exclusively of the other or others of the brothers and sister, in such parts, shares, and proportions, and in such manner in all respects as such daughters" by will or codicil should "nominate, direct or appoint, give or bequeath the same, or any part thereof," and in default of appointment upon certain trusts over.

Richard Ferrier died on the 27th of December, 1868, leaving five children, three sons and two daughters. *Mary Ferrier*, one of the daughters, made her will, dated the 23rd of January, 1869, and

(1) 13 Sim. 523.

thereby, after appointing her brothers *Richard* and *Edward* her executors, she proceeded as follows:—"I give, devise, and bequeath all and every my real and personal estate whatsoever and wheresoever, and of which I have any power to appoint or dispose by this my will, unto my said brothers *Richard* and *Edward*, their heirs, executors, administrators, and assigns, according to the nature and tenure thereof respectively, upon trust to sell and convert the same, and stand possessed of the proceeds upon trust by, with, and out of the said moneys respectively to pay and satisfy all my just debts, funeral and testamentary expenses, and all expenses incident to the trusts hereby directed; and upon further trust to lay out and invest the surplus of the same moneys in manner herein mentioned." And she then declared certain trusts of such investments in favour of her brothers and sister.

By a codicil, dated the same day, *Mary Ferrier* revoked the trusts in her said will declared in favour of her brothers and sister, and she thereby directed that the trustees of her said will should stand possessed of the moneys to arise from the sale and conversion of her real and personal estate, and other of her moneys, upon trust thereout to set apart £1000, and invest the same and pay the income to her sister for life; and upon further trust to pay £500 to her brother *Richard*, and to divide the residue equally between her three brothers.

Mary Ferrier died on the 22nd of March, 1869, a spinster. Neither at the date of her will nor at her death had she any real estate, and the value of the property she was entitled to, beyond her interest under her father's will, did not amount to £100. Her debts, funeral and testamentary expenses, did not exceed £500.

The questions argued were, whether the will was an exercise of the special power to appoint among brothers and sisters and their issue; and which were the trustees to carry out the trusts of the appointed funds.

Mr. *Ince*, for the Plaintiffs who would take under the power:—

This case comes within the decision in *Cowx* v. *Foster* (1), where a testator having a power to appoint real estate among children, gave all his real and personal estate whereof he had power to

(1) 1 J. & H. 30.

V.-C. M. 1870 FERRIER v. JAY.

dispose upon trust to sell and apply the proceeds in payment of his debts, funeral and testamentary expenses, and to divide the surplus among his children; and it was held that though the debts and expenses could not be paid out of the settled estate, the appointment was not thereby invalidated. In that case it did not appear whether the personal estate was sufficient to satisfy the debts. The property over which the testatrix had a general power to appoint under her father's will was more than sufficient to pay her debts and funeral and testamentary expenses, and she must be considered as having intended to direct that property to be applied in payment of those debts and expenses.

[He also referred to *Sugden* on Powers (1).]

Mr. *Sargant*, for the persons interested in default of appointment:—

The case of *Clogstoun* v. *Walcott* (2) is an authority in direct opposition to that of *Cowx* v. *Foster* (3). The testatrix in that case had power to appoint in favour of her children, and she appointed all the property which she had power to dispose of to trustees in trust, after payment of her debts, funeral and testamentary expenses, to invest the residue in favour of her children. She died possessed of property not included in the power of appointment, more than sufficient to pay her debts and expenses, but yet it was held that her will was not a good exercise of the power. Here it is expressly stated that the property of the testatrix not derived under her father's will was not sufficient to pay her debts, consequently the power cannot be held to be well executed.

Mr. *North*, for the trustees under the will of *Richard Ferrier*, submitted that they were the proper persons to carry out the trusts of the will.

SIR R. MALINS, V.C.:—

Upon this question two authorities have been cited, in which Vice-Chancellor *Shadwell* and Vice-Chancellor *Wood* decided different ways. In this conflict I should be bound to follow the later

(1) Vol. ii. pp. 372, 378.
(2) 13 Sim. 523.
(3) 1 J. & H. 30.

of the two decisions, because I must presume that Vice-Chancellor *Wood* had in his mind all the previous authorities upon the subject, though it does not appear that the case of *Clogstoun* v. *Walcott* (1) was cited in the argument of *Cowx* v. *Foster* (2). But, independently of that ground, I should desire to decide this case upon principle. The testatrix, by her will, professes to give all her real and personal estate whatsoever and wheresoever, and of which she had any power to appoint or dispose of, to her brothers upon trust to sell and convert the same, and out of the said moneys respectively to pay all her debts, funeral and testamentary expenses; and she then proceeds to dispose of the surplus in favour of her brothers and sister, who were the objects of the special power. Now, when she directs her own debts to be paid we may suppose that she intended that they should come out of that portion of the property over which she had a general power, and, upon the well-known rule of *reddendo singula singulis*, it may well be supposed that she meant her debts to come out of that property which was, in effect, her own, and the rest to pass to those who were the objects of the special power. I should say, therefore, that on principle she has well exercised her power, but I am relieved from difficulty in this case by the decision of the Lord Chancellor, when Vice-Chancellor, in *Cowx* v. *Foster*, although I regret that the case of *Clogstoun* v. *Walcott* does not appear to have been there cited. I think, however, that the decision in *Cowx* v. *Foster* is founded on sound principles. Upon the question as to which trustees are to carry out the trusts of the appointed fund, I must again follow the decision in *Cowx* v. *Foster*, and direct that the trustees of *Mary Ferrier's* will are the proper persons.

Solicitors for the Trustees: Messrs. *Norris, Allen, & Carter.*
Solicitors for the other Parties: Messrs. *Woodcock & Ryland.*

(1) 13 Sim. 523. (2) 1 J. & H. 30

V.-C. M.

1870

July 28.

In re BABER'S TRUSTS.

Assignment for Benefit of Creditors—Neglect of Creditor to sign—Accession by Acquiescence.

A debtor executed an assignment to trustees for the benefit of his creditors in consideration of their covenanting not to take any proceedings against him for three years, and it was provided that those creditors who should not execute the deed within six months should be excluded from the benefits conferred thereby. One of the creditors neglected to sign the deed, but acquiesced in it, and took no proceedings against the debtor:—

Held, that such creditor, having treated the deed as valid, and acquiesced in its provisions, was entitled to the benefits conferred by it.

By an indenture dated the 30th of January, 1851, *H. F. Baber* conveyed all his property which he had power to dispose of to trustees for the benefit of his creditors in consideration of their covenanting not to arrest him or take proceedings against him for the recovery of their debts for the space of three years; and the indenture contained a declaration that such creditors of *H. F. Baber* as should not sign and execute it within six months from the date thereof should be excluded from participating in the benefits conferred thereby.

The schedule to this deed included the name of *Wm. Dowdeswell* as one of the creditors, and the debt due to him by *H. F. Baber*, amounting to £10,500, was set down among the other debts.

H. F. Baber died some time in the year 1869, and in the latter part of that year certain sums of money comprised in the deed of 1851 came into the hands of the trustees sufficient to pay a dividend to such of the creditors as were entitled to receive the same.

The Petitioner, *William Dowdeswell*, had never signed the deed of 1851, and the trustees of that deed, when applied to by the Petitioner, although they admitted the correctness of his claim, alleged that they should not be justified in paying the amount claimed without the sanction of the Court, on the ground that the deed of 1851 had not been executed by him.

The sum to which the Petitioner would have been entitled amounted to £750 3*s.* 10*d.*, which had been paid into Court by the trustees of the deed.

The Petition now asked that that amount might be paid out to him, and alleged that he had all along acquiesced in the deed, and had frequently communicated with the trustees upon the subject thereof, but that never having seen the deed, he was not aware of the provision rendering it necessary that it should be executed by the creditors within six months. He submitted, however, that by his acquiescence, and his abstaining from taking proceedings against the said *H. F. Baber*, the debtor had had all the benefit of the deed as against him, which was the license from arrest or other proceedings for the space of three years.

Mr. *Glasse*, Q.C., and Mr. *Lawson*, for the Petitioner:—

The evidence in this case proves that, although Mr. *Dowdeswell* did not sign this composition deed, he acquiesced in it, and all parties considered that he was to have the benefit of it. Mr. *Dowdeswell* might have taken proceedings against Mr. *Baber*, but under the belief that he was affected by the deed, no proceedings were taken; consequently Mr. *Baber* had the benefit of the consideration upon which the deed was founded.

In *Spottiswoode* v. *Stockdale* (1) Lord *Eldon* laid it down that if a creditor acts under a deed, and thereby treats it as valid, he will be entitled in equity to the benefit of the deed, although he may not have executed it within the prescribed time; and in *Ex parte Jerrard* (2) Lord *Cottenham* said: "It is a known rule that all the creditors of an insolvent need not actually sign a composition deed; but if they concur and act under it, the Court will consider it as obligatory as if they had signed." The same decision was arrived at by Vice-Chancellor *Wood* in *Whitmore* v. *Turquand* (3), which was affirmed on appeal (4). The only case opposed to this doctrine is that of *Lane* v. *Husband* (5); but there the Vice-Chancellor decided on the ground that the debtor could not have the benefit of the consideration upon which the deed was based.

Mr. *Bardswell*, for the trustees, submitted that, as the authorities now stood, and having regard to the case of *Lane* v. *Husband*, they

(1) Coop. G. 102.
(2) 3 Deac. 1.
(3) 1 J. & H. 444.
(4) 2 D. F. & J. 107.
(5) 14 Sim. 656.

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were not justified in paying the money over to Mr. *Dowdeswell* without the sanction of the Court. The consideration in this deed was the covenant to be executed by the creditors that they would not take proceedings against the debtor for three years; and this covenant was never executed by the Petitioner.

Sir R. Malins, V.C.:—

There is no reasonable doubt, I think, of the law affecting this case. It appears that most of the creditors executed the deed of January, 1851, but Mr. *Dowdeswell* did not do so; still he acquiesced in the deed. A dividend has now become payable to the creditors under that deed, and the trustees, having paid the other creditors the dividend to which they are entitled, have paid the balance into Court, to which Mr. *Dowdeswell* would have been otherwise entitled.

It is clear from the provisions of the deed that the legal representatives of Mr. *Baber* can have no claim to the money until all the creditors are paid in full. This money, it appears, would not be sufficient to satisfy all the creditors; therefore, if Mr. *Dowdeswell* is not entitled to it, it will go to increase the dividend to the other creditors. The only question, then, is, whether, by reason of Mr. *Dowdeswell* not having executed the deed within six months, in pursuance of the clause contained in it, he is to be excluded from participating in the benefits under the deed. The case of *Lane* v. *Husband* (1), which has been cited, appears to stand entirely by itself, and I should have great difficulty in following it; but the view taken by Lord *Eldon* in the case of *Spottiswoode* v. *Stockdale* (2) seems to embrace the whole subject. He says: "I take it to be quite clear that if creditors are to execute a deed of assignment by a time stated therein, and it is provided by the deed that in case they do not do so, the deed shall be null and void; in case they do not execute the deed within that time, the deed is void at law. This deed, therefore, was void at law for that reason. But it is the constant course in equity that if creditors act under such a deed, and thereby treat it as valid, although they have not executed it, a Court of Equity will also act under it, and treat it as valid, whether such creditors have signed it or not."

(1) 14 Sim. 656. (2) Coop. G. 102, 105.

On this principle, which commends itself by its sound sense and justice, I think that Mr. *Dowdeswell* has established his title to the fund in Court.

V.-C. M. 1870 *In re* BABER'S TRUSTS.

Solicitors for the Petitioner: Messrs. *Redpath & Holdsworth.*
Solicitors for the Trustees: Messrs. *Burton, Yeates, & Hart.*

MOUNSEY *v.* EARL OF LONSDALE. ATTORNEY-GENERAL *v.* EARL OF LONSDALE.

V.-C. M. 1870 *Aug.* 1.

Costs—Motion ordered to stand over till the Hearing.

In a suit to restrain the erection of a jetty in a river, a motion for an injunction was ordered to stand over till the hearing, and no direction was given as to costs. At the hearing a decree was made for a perpetual injunction, with costs, but the costs of the motion were not mentioned in the decree:—

Held, that the costs of the motion were costs in the cause.

In October, 1864, the Plaintiff, Mr. *Mounsey*, filed the original bill in this suit against the Earl of *Lonsdale* for an injunction to restrain the Defendant from continuing or completing the construction of a jetty in the bed of the river *Eden* so as to injure the Plaintiff's land. In the same month a motion was made for an interim injunction, and was ordered to stand over till the hearing of the cause, but the order gave no direction as to the costs of the motion.

In January, 1865, the information and amended bill was filed, praying for an injunction to restrain the Defendant from continuing or completing the construction of the jetty so as to injure the Plaintiff's land, or so as to interfere with the free use and navigation of the river as a public navigable stream or highway.

Upon the hearing of the cause in December, 1868, as reported (1), a decree was made for a perpetual injunction according to the prayer of the information and bill, and the Defendant was ordered to pay the costs of the suit. The affidavits filed in support of, and

(1) Law Rep. 7 Eq. 377.

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in opposition to, the motion were read and used at the hearing, but the decree was silent as to the costs of the motion.

The Taxing Master, in taxing the Plaintiff's costs of the suit, disallowed the costs of the motion, including the costs of the affidavits.

This was an application on behalf of the Plaintiff, by summons adjourned from Chambers at the request of the Defendant, to review the taxation as to the disallowance of the costs of the motion.

Mr. *Glasse*, Q.C., and Mr. *Mounsey*, for the Plaintiff:—

The Plaintiff is entitled to his costs of the motion as costs in the cause. The Plaintiff was bound, according to the practice of the Court, to move for an interlocutory injunction to prevent the Defendant from completing the jetty before the hearing of the cause; the motion, therefore, was a part of the machinery for the determination of the cause, and as the suit has been entirely successful, the motion must be considered a successful motion under the rules laid down by Sir *John Leach* (1); *Betts* v. *Clifford* (2). In *Stevens* v. *Keating* (3) the Defendant, upon the bill being dismissed with costs, was held entitled to his costs of a motion for an injunction, although the injunction had been granted. If necessary, the Court will make a separate order for the taxation and payment of these costs, as in *Viney* v. *Chaplin* (4). At all events, the costs of the affidavits which were read at the hearing and entered in the decree must be allowed.

Mr. *Wickens*, for the Defendant:—

The sole question upon this application is, whether, according to the rules and practice of the Court, the costs of a motion, upon which no order has been made, except that it should stand over to the hearing, are costs in the cause, and it is submitted that they are not: *Morgan* and *Davey* on Costs (5), and the cases there cited. The Plaintiff ought to have asked for these costs at the hearing, and the Court would then have heard argument on the question

(1) 1 S. & S. 357.
(2) 1 J. & H. 74.
(3) 1 Mac. & G. 659.
(4) 3 De G. & J. 282.
(5) Pages 33, 34.

whether they ought to be allowed: his proper course now would be to make a special application under the liberty to apply in the decree, as in *Viney* v. *Chaplin* (1), and then the question might be argued on the merits. What he now asks is simply to review the Taxing Master's certificate, which, as the decree stands, is quite correct.

Mr. *Glasse*, in reply:—

In *Viney* v. *Chaplin* the costs of the motions had been reserved to the hearing. In this case the order upon the motion gave no direction as to costs.

SIR R. MALINS, V.C.:—

Upon the hearing of this cause I made a decree by which the Defendant was ordered to pay the costs of the suit. The object of the suit was to prevent the Defendant from continuing (when the bill was originally filed) the erection of a jetty in the river *Eden*. When the cause came on, I believe the jetty was practically completely finished, but the result of my decree was to direct the Defendant to remove it. While it was in course of erection, a motion to prevent its continuance was made before Vice-Chancellor *Kindersley* on the 14th of September, 1864. The bill was afterwards amended, and it was then made an information as well as a bill. On the motion before Vice-Chancellor *Kindersley*, which, in fact, involved the whole merits of the case, the Vice-Chancellor thought it was a case to be decided at the hearing; and, as the work was mainly completed, he thought, and no doubt correctly and properly thought, that it was a case of very considerable importance, public and private, and that the hearing of the cause was the proper time to decide the question. That motion was one which it would have been impossible for the Plaintiff to avoid making, unless he gave up his cause; because, if he had stood by and acquiesced without remonstrance in the erection of the jetty, without coming before the Court, it would, to my mind, have been fatal, or almost fatal, to his success at the hearing, in accordance with the practice of the Court, as laid down in *Bacon* v. *Jones* (2), that in such cases the plaintiff, in order to succeed at the hearing,

(1) 3 De G. & J. 282. (2) 4 My. & Cr. 433, 438.

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must make an interlocutory application. The affidavits made on the motion were read at the hearing of the cause. Now, when I ordered that Lord *Lonsdale* should pay the costs of the suit, my decree was wholly silent on the subject of the costs of the motion. What I have now to decide is, whether the costs of the motion are or are not to be paid by Lord *Lonsdale*.

Now, is it a successful or an unsuccessful motion? Nothing, in my opinion, is more clearly settled than that the costs of a successful motion in a cause are costs in the cause. That has been the settled rule of the Court ever since 1823, if it was not settled before. If, therefore, this was a successful motion, as a matter of course the costs were costs in the cause, and ought to have been taxed as against the Defendant. If it was an unsuccessful motion, then the Plaintiff would not have the costs unless they were given to him by the Court specially. Was it, then, a successful or an unsuccessful motion? I consider that it was a successful motion. It had this success, that it did not fail; it was not dismissed, but, on account of the convenience of the Court and the importance of the question, the Court thought that it ought to stand over to the hearing of the cause; and at the hearing the motion as well as the hearing was on, and the affidavits made in the one were used in the other. I am told that the Taxing Master has not given the costs of the affidavits mentioned in the decree. If that is so, I think he has miscarried, because, when affidavits are used at the hearing of a cause, it is the duty of the Taxing Master, in my opinion, to allow the costs of all affidavits which are mentioned in the decree.

With regard to the costs of the motion, I have not a shadow of doubt now of what my intention at the hearing of the cause was, because it was a very troublesome one, and I took considerable time in considering it. In making up my mind and writing my judgment I had to read again and again every one of the affidavits, and as they contributed materially to the success of the cause, I should have been guilty of monstrous injustice if I had been asked to give the costs to the Plaintiff and had not given them. Mr. *Wickens* says that I should have heard arguments from him and Mr. *Jessel* on the question. I am perfectly satisfied that no length of argument, and no earnestness of argument, would ever have

convinced me that I was not bound to give those costs. Upon the principles which are established the Plaintiff was clearly entitled to them. If I had had any doubt upon the subject, there can hardly be any question that the opinion of the present Lord Chancellor, when Vice-Chancellor, in *Betts* v. *Clifford* (1), would have been cited to me. He has there laid down that it would be a very short measure of justice indeed, when a Plaintiff comes forward to this Court with an interlocutory application, and succeeds ultimately in his cause, that he is not to have the costs of that interlocutory application, which has been necessitated by the conduct of the Defendant. It has been shewn that the erection of a pier half-way across the river *Eden* was an improper proceeding on the part of Lord *Lonsdale*, for which he has had to pay; and I think I should be meting out to the Plaintiff a very narrow measure of justice if I did not order the Defendant to pay the costs of the motion as well as the costs of the cause generally. I consider that on every principle of justice I am bound to direct that the Taxing Master now do tax the costs of the motion, and in doing so I think I am only acting in strict accordance with *Viney* v. *Chaplin* (2), and also with my own decision in the case of *Harris* v. *Hilliard* (3), where I ordered that the costs of a motion should be given, although my decree had been silent as to those costs.

On all these grounds I am of opinion that the costs must be given, and I am also of opinion that Lord *Lonsdale* must pay the costs of the adjournment of this summons into Court.

Solicitors for the Plaintiff: Messrs. *Gray, Johnston, & Mounsey.*
Solicitors for the Defendant: Messrs. *Ellis & Ellis.*

(1) 1 J. & H. 74.
(2) 3 De G. & J. 282.
(3) 20 L. T. (N.S.) 216. In that case the Plaintiff presented a petition under the liberty to apply in the decree.

V.-C. M.
1870
August 2.

GULLY *v.* DAVIS.

Charge upon Real Estate—Testator possessed of Leaseholds and no Freeholds.

A testator gave his real estate upon trust to pay to his housekeeper 12*s.* per week, and the remainder of the rents and profits to be divided as therein mentioned. The testator had no freehold estate, but he had leaseholds for a long term, which he always believed to be of freehold tenure:—

Held, that the leaseholds were charged with the weekly payment.

CHARLES RUSSELL, by his will, dated the 16th of November, 1869, gave and devised all his real estate to trustees upon trust to pay to his housekeeper, *Ann Gully*, the sum of 12*s.* per week, and the remainder of the rents and profits of his real estate to be divided as therein mentioned; and the testator gave and bequeathed all his personal estate to his executors upon trust to divide the same between his daughter *Mary Drew* and his grandchild *George May*.

The testator had not, at the date of his will, or at the time of his death, any real estate, but he was possessed of estates which he believed in his lifetime to be of freehold tenure, but which, since his death, had been discovered to be leaseholds for long terms of years.

Ann Gully, the housekeeper, filed this bill for a declaration that she was entitled, out of such leasehold estates, or the rents and profits thereof, to be paid the weekly sum of 12*s.* by the will bequeathed to her.

The question was raised upon demurrer to the bill.

Mr. *J. T. Humphry*, in support of the demurrer, cited *Wilson* v. *Eden* (1).

Mr. *Freeling*, for the bill, was not called upon.

Sir R. Malins, V.C.:—

The testator made his will in 1869; consequently, in conformity with the *Wills Act* (1 Vict. c. 60), this testator must be con-

(1) 18 Q. B. 474.

sidered as speaking at the time of his death. The bill states that at the time of his death, as well as at the date of his will, he was possessed of an estate which he believed to be of freehold tenure, but it turns out that the estate is a leasehold for a long term of years. Therefore, believing the estate to be freehold, he charges it with the payment of 12s. per week to his housekeeper for life, and he gives his personal estate in another direction.

Now, nothing is better settled than that when a testator gives freehold estate at a particular place, and it turns out that he has no freehold estate at that place, but he has leasehold estate, the leasehold estate will pass; and if he has lands in fee and lands for years, and devises all his lands and tenements, the fee simple lands pass only, and not the leases for years; but if he has no fee simple, the leases for years will pass. That was decided in *Rose* v. *Bartlett* (1).

This testator had property of a leasehold nature, which he believed to be freehold; therefore I must consider that, inasmuch as he died in the belief that the property was freehold, and having no freehold estate, but only leasehold, he meant to charge that property with the payment of the 12*s.* per week. The demurrer will therefore be overruled.

Solicitors for all parties: Messrs. *Torr, Janeway, & Co.*

(1) Cro. Car. 292.

V.-C. J.
1870
April 30.
V.-C. B.
1870
July 30.

In re TEAGUE'S SETTLEMENT.

Marriage Settlement—Power of Appointment amongst Children—Appointment to Married Daughter for Separate Use, with Restraint upon Anticipation—Rule against Perpetuities—Rejection of Restraint Clause—Similar Appointment to Unmarried Daughter—Subsequent Marriage.

A widow, having under her marriage settlement a power of appointment amongst the children of the marriage, executed the power by giving to one of her five daughters, who was married, a fifth share of the fund for her separate use, independently of her then or any future husband, but without power of anticipation; and after her decease as she should generally by deed or will appoint, and in default of appointment, for her executors and administrators absolutely:—

Held, that the whole appointment was not void, and that it was a valid execution of the power, except as to the restraint upon anticipation, but that the attempted restraint upon anticipation was ineffectual and void.

Observations on *Fry* v. *Capper* (1).

A similar appointment was made to another daughter, unmarried at the date of the appointment, who afterwards married:—

Held, that marriage did not operate as an adoption of the trusts of the fund so as to establish the validity of the restraint clause.

PETITION.

By a settlement made on the 22nd of July, 1831, prior to the marriage of *Charles Brooks Teague* and *Elizabeth Christiana Boote*, it was declared that the trustees should stand possessed of a sum of £3000 upon trust to invest and pay the income, during the joint lives of husband and wife, to the wife for her separate use, and after the death of either of them to the survivor for life; and from and after the death of the survivor should stand possessed of the fund, "in trust for all and every or such one or more, exclusively of the other or others, of the children" of the marriage "at such age or respective ages, day or days, and if more than one, in such parts, shares, and proportions, and with such provisoes, and subject to such conditions and substitutions in favour of one or more of the other or others of the said children" as the wife, in case she should survive the husband, should by deed or will appoint; and in default for the children of the marriage equally as tenants in common, "to be vested" in sons "when and as" they should attain

(1) Kay, 163.

twenty-one, and in daughters "when and as" they should attain twenty-one or marry.

Charles Brooks Teague died on the 7th of October, 1860. There were issue six children, of whom five were living at the date of the next stated appointment, the youngest having died in early childhood. Of these five, one, a daughter, named *Fanny Maria*, in December, 1860, married *Middleton Ashdown*, without a settlement.

On the 14th of February, 1863, Mrs. *Teague*, widow, by a deed-poll, in execution of the power reserved to her by the settlement, appointed that the trust funds should go, as to one undivided fifth part or share, in trust for *Fanny Maria Ashdown* for life, for her separate use, independently of her then or any future husband, and so that her receipt alone should be a sufficient discharge for the same, "and so that she shall not have power to deprive herself thereof by anticipation;" and after her decease, in trust "for such person or persons, for such interest or interests, and in such manner," as *Fanny Maria Ashdown* should by deed or will appoint; and in default of such appointment, in trust for *Fanny Maria Ashdown*, her executors, administrators, and assigns, absolutely. She also appointed that the trust funds should go, as to another undivided fifth part or share, in trust for *Emilie Harvey Teague* (an unmarried daughter) for life, for her separate use, independently of any future husband (and so on, following the words of the former gift).

Emilie Harvey Teague afterwards, being of full age, married *James Robert Jeffries*, as it was stated, without any nuptial settlement or contract; but this fact was not in evidence.

Mrs. *Teague* died in June, 1868, whereupon the fund fell into possession, and the two fifths appointed by the deed of February, 1863, were paid into Court by the trustees of the settlement.

In their affidavit the trustees stated the above facts, and that Mr. and Mrs. *Ashdown* had applied to them to pay and transfer the fifth share to Mr. *Ashdown*, on the ground that under the appointment Mrs. *Ashdown* was entitled to her fifth as in default of appointment, and at other times on the ground that she had an absolute power to appoint and dispose of the same share. They, however, had been advised that they could not safely pay over the share.

V.-C. J. 1870 *In re* TEAGUE'S SETTLEMENT.

By a deed dated the 11th of March, 1870, and made between *Fanny Maria Ashdown* of the first part, *Middleton Ashdown* of the second part, and *George Hobbs* of the third part, after reciting that *Fanny Maria Ashdown* was, under the trusts of the deed of appointment of February, 1863, entitled to her separate use to a life-interest in the fifth, with power to appoint the remainder, "the restraint against anticipation being by law ineffectual," and that it was considered that the power of appointment given to *Fanny Maria Ashdown* was exerciseable by her without the concurrence of her husband, but that to avoid all doubts, and for the absolute confirmation of those presents, he had consented to join in those presents, it was witnessed that *Fanny Maria Ashdown* thereby assigned all her life interest, and further appointed all her reversionary interest in the same fifth share, and further, with the consent and concurrence of *Middleton Ashdown*, assigned, and *Middleton Ashdown* confirmed, all the share and interest, as well reversionary as in possession, of the said *Fanny Maria Ashdown* in and to the funds comprised in the settlement, either by virtue of the appointment of February, 1863, or in default of appointment, to *George Hobbs*, upon the trusts contained in a deed of even date therewith, which were in substance, after payment of costs, for the sole benefit of *Fanny Maria Ashdown*.

This Petition was presented by Mrs. *Ashdown* and *George Hobbs*, alleging that she had made repeated applications to the trustees of the settlement for the payment to her of the one-fifth, but that they always denied that she, either alone or in concurrence with her husband, had an absolute power of disposal over the fifth, and insisted that the restraint upon alienation in the deed of appointment of the 14th of February, 1863, was valid and effectual.

The Petitioners prayed that the sum of stock which represented Mrs. *Ashdown's* fifth share, and any interest to accrue due in respect thereof, might be transferred and paid to *George Hobbs;* and that Mrs. *Jeffries'* fifth share might be carried to a separate account, to be entitled "In the Matter of the Trusts of the Settlement . . . so far as relates to the share of *Emilie Harvey Jeffries*."

Mr. *Fry*, Q.C., and Mr. *Warmington*, for the Petitioners:—

The question is, whether the Court can reject that part of the

appointment which transgresses the rule against perpetuities—namely, the restraint upon anticipation—and give effect to the rest of the appointment.

The Court must do one of two things: either reject the restraint upon anticipation and uphold the appointment, or uphold the restraint and avoid the appointment as transgressing the rule against perpetuities. We submit it will do the former.

The same necessity arose in *Fry* v. *Capper* (1). The declaration there made that the will was a valid execution of the power could only have been made by rejecting the restraint clause; and that case is accordingly decisive of the present in favour of the Petitioners. The observations of the present Lord Chancellor, then Vice-Chancellor *Wood* (2), shew that he intended so to decide.

If the restraint clause be held void, and the rest of the appointment good, the result will be that this fifth share belongs absolutely to Mrs. *Ashdown's* trustee.

Mr. *Amphlett*, Q.C., for the Respondent, Mrs. *Jeffries*, supported the same view.

Mr. *Hardy*, Q.C., for the trustees of the settlement:—

The restraint upon alienation in this instance is perfectly good, and Mrs. *Ashdown's* trustee is not entitled.

In *Fry* v. *Capper*, which was precisely this case, Lord *Hatherley*, expressly said (3): "The point is ingenious, and would deserve, perhaps, more consideration, if it were open to me. However, if *Thornton* v. *Bright* (4) had not decided the question, I think that I should have come to the same conclusion, independently of that authority." That is to say, His Lordship did not consider the invalidity of the clause to be an arguable question after the decision in *Thornton* v. *Bright*, and went on to declare the will "a valid execution of the power." He says not a word about any part of it being bad, but holds it all to be good; and the marginal note of the case, with all deference to the learned reporter, is incorrect.

In *Thornton* v. *Bright*, Lord *Cottenham* decided that an appointment to trustees, for the separate use of a married daughter, during

(1) Kay, 163.
(2) Ibid. 170.
(3) Kay, 171.
(4) 2 My. & Cr. 230.

V.-C. J. 1870 *In re* Teague's Settlement.

the joint lives of herself and her husband, with restraint on anticipation, was good. In *Wollaston* v. *King* (1), a donee of a power appointed to her son *C.* for life, with remainder to such persons as he should by will appoint. That is clearly distinguishable.

No doubt the doctrine established by *Thornton* v. *Bright* (2) and *Fry* v. *Capper* (3) is to some extent a modification of the rule against perpetuities. But it is easy to see how it arose. First, it was held that an appointor, with such a power as this, might have appointed this fifth share to trustees for the separate use of a married daughter. Then it was considered that the restraint upon anticipation is merely a supplement to the separate use, "only an unfolding of all that is implied in a gift to the separate use:" *Parkes* v. *White* (4); *Bray* v. *Bree* (5).

It cannot be said that the rule would have been infringed if Mrs. *Teague* had put this restraint upon her daughter for twenty-one years and no more; then what reasonable ground is there for not extending the protection to the daughter throughout her married life?

Mr. *Eddis*, Q.C., for the Respondents, *Middleton Ashdown*, and *James Robert Jeffries*.

Mr. *Fry*, in reply:—

This point was not argued either in *Thornton* v. *Bright*, or in a similar case of *Carver* v. *Bowles* (6).

Sir W. M. James, V.C.:—

I think that, practically, *Fry* v. *Capper* is a decision upon this point. The Lord Chancellor there observes (7): "Upon principle I think that Mr. *Willcock* has given the proper answer to the objection. In the case of an appointment under a power, the Court looks to the scope and intent of the power; and in appointments by will of real estate has, by the doctrine of *cy-près*, given effect to them against the very words of the instrument, . . . and because the words of the appointment would otherwise have been wholly

(1) Law Rep. 8 Eq. 165.
(2) 2 My. & Cr. 230.
(3) Kay, 163.
(4) 11 Ves. 209, 221, 222, 225.
(5) 2 Cl. & F. 453.
(6) 2 Russ. & My. 301.
(7) Kay, 170.

inoperative, the Court has thus given effect to it, in the mode in which it can take effect legally. . . . According to *Bray* v. *Hammersley* (1), this is in other respects a good appointment to the children who are objects of the power; but if the restriction be not rejected, it is said that it will make the whole void. Rather than decide that, the Court will reject the limitation, and thus leave the rest of the appointment valid." That is to say, the Court, in that instance, adopted a ground which justifies on principle all the decisions that had been arrived at.

I consider that that was a sound principle on which to decide the case of *Fry* v. *Capper* (2), and I think it is impossible to hold that the rule against perpetuities can be abrogated in the way which has been suggested.

A second point arose as to Mrs. *Jeffries'* share.

Mr. *Hardy*:—Mrs. *Jeffries* having been a single woman when the appointment was made, her marriage operated as an adoption by all parties of the trusts of the fund as it stood limited at the time of her marriage. Amongst those trusts was the restraint upon alienation. If so, the fund need not be carried to a separate account.

Mr. *Amphlett*, for Mrs. *Jeffries*.

SIR W. M. JAMES, V.C., said that the circumstance did not affect the result of his decision. The fund must be carried to the separate account of the married lady; and, if necessary, an inquiry be directed whether any and what settlement, or agreement for a settlement, was made.

Mr. *Hardy* referred to *Tullett* v. *Armstrong* (3).

The VICE-CHANCELLOR said that, in his opinion, *Tullett* v. *Armstrong* did not decide the point, as was contended. In *Tullett* v. *Armstrong*, the wife, when she became discovert, might have alienated the fund, and so have got rid of the fetter, but did not.

(1) 3 Sim. 513; S. C. *Bray* v. *Bree*, 2 Cl. & F. 453. (2) Kay, 163.
(3) 4 My. & Cr. 377.

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In this instance, as this lady and her husband might have married on the faith of some agreement, he should have to be satisfied that there was no ante-nuptial contract before he parted with the fund.

The following are minutes of the order:—

Declare that the appointment in favour of the Petitioner, *Fanny Maria Ashdown*, made by the said deed-poll of the 14th of February, 1863, was and is a valid execution of the power, except so far as such appointment affected to restrain the said *Fanny Maria Ashdown* from disposing of her life interest in the said trust fund thereby appointed to her, and that such attempted restraint is ineffectual and void.

Declare that the appointment in favour of *Emilie Harvey Jeffries*, then *Emilie Harvey Teague*, by the said deed-poll was and is a valid execution of the power (except as before), and declare that such attempted restraint is ineffectual and void.

Tax, as between solicitor and client, the costs of the Petitioners and of the trustees, Mr. *Ashdown* and Mr. and Mrs. *Jeffries*, including the charges and expenses of the trustees properly incurred.

Sell so much of the fund as will raise such costs, and pay the same to the respective solicitors.

Pay one moiety of the residue to the Petitioner, *George Hobbs*, and the other moiety to the account as prayed.

Liberty to any persons interested in the funds carried to the last-named fund to apply.

July 30. The Petition was brought on again to-day before Vice-Chancellor *Bacon*.

Since the date of the former order, an assignment to a trustee in similar terms to those of the deed of the 11th of March, 1870, had been executed by Mr. and Mrs. *Jeffries*.

From an affidavit by Mr., and another by Mrs., *Jeffries*, it appeared that, at the time of their marriage, neither of them was aware that the fund came by way of appointment at all. They both thought it came under the original settlement, in default of appointment. So far from contracting on the faith of the restraint clause, they had never heard of it; and Mr. *Jeffries* said that if he had, he should have asserted his right to have it treated as inoperative.

On the other hand, affidavits were read, shewing that upon Mr. *Yarington*, the solicitor of Mr. *Jeffries*' mother, writing to

Mr. *Spyer*, the solicitor of Mrs. *Jeffries'* mother, on the subject, Mr. *Spyer* replied that the young lady was entitled, by way of appointment, to the share for her separate use, but did not mention the restraint upon anticipation. Mr. *Yarington* added that he acted rather as the friend of Mrs. *Jeffries* the elder than as her solicitor; that she was dead, and he believed she did not communicate the facts furnished by Mr. *Spyer* to her son.

Mr. *Fry*, Q.C., and Mr. *Warmington*, for the Petitioners.

Mr. *Hardy*, Q.C., for the trustees, restated the question of law, and referred again to *Tullett* v. *Armstrong* (1); but

The VICE-CHANCELLOR held that the question was not now open for discussion on this ground.

Mr. *Hardy* referred to the evidence.

Mr. *Eddis*, Q.C., for the Respondent, *James Robert Jeffries*.

MR. BACON, V.C.:—

The question which Mr. *Hardy* has so ably discussed is not now open for my judgment. I am not now hearing an appeal from my predecessor. The Lord Justice, when Vice-Chancellor, had present to his mind the authority of *Tullett* v. *Armstrong*, and I am bound by his decision.

All that now remains is to consider the result of the evidence; and that satisfies my mind, beyond a shadow of doubt, that these persons did not enter into the contract of marriage upon the faith of any agreement or understanding that the restraint on alienation should exist over this property, of the existence of which restraint they were at that time unaware.

The order will be that the cash be paid to Mrs. *Jeffries*, and the stock transferred to her trustee.

Solicitor for the Petitioner: Mr. *W. H. Herbert*.

Solicitors for the Respondents: Messrs. *Spyer & Son*; Messrs. *Nethersole & Speechly*.

(1) 4 My. & Cr. 377.

V.-C. J.

1870

June 11;
Aug. 3.

In re WOOD'S ESTATE.

Lands Clauses Act, s. 74—*Leaseholds under Dean and Chapter—Renewal Fund—Trustees—Ecclesiastical Commissioners—Tenant for Life and Remainderman—Apportionment of Purchase-money*—23 & 24 *Vict. c.* 124.

Leaseholds under a Dean and Chapter, renewable by custom, were held by trustees upon trust for a tenant for life, with remainder over; and the trustees were directed, "two years or sooner before the time for renewal," to bring a part of the rental into a fund until a sufficient sum was raised for the renewal, "so that the estates may be always kept renewed . . . for ever." In June, 1865, and February, 1866, notices to treat for parts of the leaseholds, then having about thirteen and five years respectively to run, were given by a railway company. At Lady Day, 1866, the Dean and Chapter ceased to renew leases; and about the same date their property was taken over by the Ecclesiastical Commissioners.

The values of the two properties having been assessed at amounts which, when paid, and invested in £3 per Cent. stock, gave a diminished income to the tenant for life:—

Held, that the tenant for life was not entitled to be recouped the deficiency of income out of the *corpus* of the fund.

Morres v. *Hodges* (1) and *Tardiff* v. *Robinson* (2) considered and distinguished.

PETITION.

Joseph Wood, of *Westminster*, brewer, by his will, dated the 23rd of October, 1827, appointed his wife *Mary* and his son *Joseph Carter Wood* his executors. He directed as follows:—

"And I do direct that two years or sooner before the time for renewal of any estates which I hold under the Dean and Chapter of *Westminster* shall arrive, such a part of my rental shall be brought into the funds until a sufficient sum is raised for the renewal of the said estates, and so on, in the latter part of the next fourteen years, so that the estates may be always kept renewed, that the younger children may have an equal benefit of time, and so continue to be provided for, for ever."

After devising certain freehold estates, he gave to his wife *Mary*, "in trust for her life only," all his remaining estates, freeholds, leaseholds, ground-rents, and reversions; and at her death

(1) 27 Beav. 625. (2) 27 Beav. 629, n.

he gave "the whole rents and produce, share and share alike, of all such freeholds, leaseholds, ground-rents, and reversions" . . . in trust for his "surviving female children," . . . "but to have no power to sell, mortgage, or in any way whatsoever to incumber the same," . . . the rents to be received by his executor, *J. C. Wood*, and to be paid by him to them; "on the decease of any of these children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children." He further declared that his daughter, Mrs. *Eliza Johnstone*, was exempt from any benefit arising from the will, she having had her share of his property at her marriage.

The testator died on the 30th of June, 1828, leaving his widow *Mary* and seven female children surviving, namely, *Charlotte*, *Eliza*, wife of *Charles Hope Johnstone*, *Caroline*, since the wife of *Henry Foskett*, *Maria Foskett*, now a widow, *Adelaide*, since the wife of *Edward Richards Adams*, *Georgina*, late the wife of *Charles Favell Forth Wordsworth*, and *Julia Pollock*, now a widow.

Mrs. *Wordsworth* died in the lifetime of the tenant for life; and in a suit of *Wordsworth* v. *Wood* it had been held that her children took no interest under the will.

The testator's widow died on the 28th of April, 1851.

Of the five daughters who, upon Mrs. *Wood's* death, became entitled to receive the income of the leaseholds in equal shares, Mrs. *Adams* and Mrs. *Pollock* had families of children.

Part of the bequeathed leaseholds consisted of a public-house in *Westminster* called "*The Bull*," the lease of which had, since the testator's death, in pursuance of the directions contained in the will, been several times renewed, the last renewal having been effected in 1864 by an indenture of lease dated the 18th of April in that year, and made between the Dean and Chapter of *Westminster* of the one part, and *Joseph Carter Wood*, as surviving executor of the will, of the other part, whereby the premises were demised for a term of forty years from the 6th of April, 1864.

Another part of the same leaseholds consisted of a public-house called "*The Cock and Tabard*," in *Tothill Street*, *Westminster*, the lease of which had also, since the testator's death, in pursuance of

V.-C. J. 1870 *In re* Wood's Estate.

the directions contained in the will, been several times renewed, the last renewal having been effected in 1856 by an indenture of lease dated the 25th of October, 1856, and made between the Dean and Chapter of the one part, and *Joseph Carter Wood*, as such executor as aforesaid, of the other part, whereby the premises were demised for a term of forty years from the 23rd of October, 1846.

Both these premises were required by the *Metropolitan District Railway Company*. Notice to treat for part of the former was given on the 16th of June, 1865, and a jury assessed the value of the whole at £3000, which sum was paid into Court. Notice to treat for the latter was given on the 9th of February, 1866, and a jury assessed the value at £6500, which sum was also paid into Court.

By order of the Court made on Petition it had been directed that the income of the investment of each of these sums should, until further order, be paid to *J. C. Wood*, "to be dealt with and applied by him as part of the annual produce of the leasehold estates" of the testator.

The two sums were now represented by two sums of £3170 8*s.* 2*d.* and £6869 4*s.* 5*d.*, New £3 per Cents., respectively.

A second Petition was now presented under the 74th section of the *Lands Clauses Act*, 1845, by *Charlotte Wood*, Mr. and Mrs. *Foskett*, *Maria Foskett*, Mr. and Mrs. *Adams*, and Mrs. *Pollock*; the Respondents being, the trustee, Mrs. *Adams*' and Mrs. *Pollock's* children, and the railway company.

At the date of the testator's will it was customary with, but not obligatory on, the Dean and Chapter to renew their leases, but such custom ceased soon after the time when the premises were taken by the railway.

The income of the investments was considerably less than the rent had been.

The Petitioners claimed to have the two sums of stock carried over and paid in such manner as would give to the Petitioners and other parties interested therein the same benefit therefrom as they might lawfully have had from the leasehold estates.

Mr. *Jessel*, Q.C., and Mr. *Fellows*, for the Petitioners:—

The only question is, how the fund is to be divided between the tenant for life and remainderman.

We propose that an amount of stock, representing the money value of an annuity equal to the net rent for the number of years the lease has to run, should be transferred to the Petitioners, as was done by Sir *G. M. Giffard*, when Vice-Chancellor, in *In re Pfleger* (1).

The next point is, whether anything is due to the remainderman in respect of the trust which it has become impossible to fulfil, namely, the setting aside of a sum for renewal. By the 20th section of the *Episcopal and Capitular Estates Act Amendment Act* (2),

(1) Law Rep. 6 Eq. 426.

(2) The following sections of the statute 23 & 24 Vict. c. 124, were referred to:—

Sect. 20. "In any case in which any estate or interest under any lease or grant made by any such ecclesiastical corporation may be vested in any person or persons as a trustee or trustees, whether expressly or by implication of law, with power to raise money for the purpose of procuring a renewal of such lease or grant, and in every other case in which a power is vested in any person or persons for that purpose, it shall be lawful for such person or persons to raise money for the purpose of purchasing the reversion of, or otherwise enfranchising, the property comprised in such lease or grant, and to apply the same accordingly in the same manner and subject to the same conditions, *mutatis mutandis*, so far as the same may be applicable to the case, as such person or persons might by virtue of such power have raised money for the purpose of renewing such lease or grant, and have applied the same accordingly."

Sect. 24. "In any case where a treaty shall have been or shall be entered into under the said Acts . . . for any sale, exchange, or purchase, it shall be lawful for either party to require the other party to join in referring to arbitration the finding of the annual value of the property comprised in the lease or grant, and of the value of the fee simple, and when such values have been found it shall be binding on both parties, if either party require to proceed to such sale, exchange, or purchase, on terms to be computed according to such finding: Provided always, that whenever the Ecclesiastical Commissioners shall decline to enter into a treaty with a lessee for either the sale of the reversion, or the purchase of the term of or in the lands held by such lessee, it shall nevertheless be lawful for such lessee, at any time within two years after the said Commissioners shall have so declined to treat, to require that his estate and interest therein shall be purchased by the Ecclesiastical Commissioners so declining to treat as aforesaid, and that the value of such estate and interest shall be ascertained by such methods and with such extension of the unexpired term on his said lease as are by this Act provided in respect of other leaseholds."

Sect. 25. "Provided always, that under any arbitration under the said Acts . . . where any lease shall relate to lands (except building ground or houses) the beneficial interest of the lessee shall be valued at the same rate of interest at which the value of the fee simple has been determined; and where such lease shall relate to houses or to building ground it shall be lawful for the arbitrator or arbitrators or um-

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passed in 1860, trustees of a lease who have power to raise money for renewals, may raise money for the purpose of purchasing the reversion, "in the same manner and subject to the same conditions" as they might have raised money for the purpose of renewal.

In *Morres* v. *Hodges* (1) before Lord *Romilly*, M.R., in January, 1860, where trustees were directed by a settlement "to use their utmost endeavours to renew upon reasonable terms," there being no covenant, but only a custom, to renew, and the Ecclesiastical Commissioners, having become owners of the freehold, refusing to renew, it was held that the fund which had been reserved became

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pire, as the case may be, simply to find the gross sum to be paid for such sale or enfranchisement, in such manner as he or they may deem just: Provided also, that regard shall be had to any consideration given to the lessee by this Act on account of the long-continued practice of renewal. . . ."

Sect. 36 provides, that wherever an estate under such lease or grant is vested in trustees, and moneys are vested in the same trustees, they may raise out of such moneys sufficient for the renewal of the lease.

Sect. 37 provides that lands in the lease, or other lands settled to like uses, may be sold or mortgaged to raise money for the purchase of the reversion of or otherwise enfranchising the property comprised in such lease or grant, "in such manner and subject to such provisions for protecting or adjusting the equities arising under such purchase or enfranchisement, and such mortgage or sale as aforesaid, as the Court shall think fit. . . ."

Sect. 38. "In any case in which the estate and interest under any lease or grant made by any ecclesiastical corporation may be vested in any trustee or trustees, and such trustee or trustees shall not have power to sell, it shall be lawful for such trustee or trustees, with the consent in writing of the person or persons entitled for the time being to the beneficial receipt of the rent or annual proceeds thereof, if such person or persons shall be capable of giving consent, or if there shall be no person capable of giving consent, or if such consent shall be withheld, and the trustee or trustees shall consider a sale essential to the interests of parties entitled under the settlement, then, with the sanction and approbation of the Court of Chancery, to be obtained on petition to the said Court, to sell and dispose of all or any part of such property; and in every such case the purchase-money shall be paid to such trustee or trustees, whose receipt shall be a good discharge for the same; and the money so paid to such trustee or trustees shall be invested and be held by him or them upon the same trusts, as far as the circumstances of the case will admit, as the leasehold property, if not sold, would have been subject to; and such investment may, with the sanction and approbation of the Court of Chancery, be made in the purchase of other leasehold estates, whether held under any ecclesiastical corporation or not."

(1) 27 Beav. 625.

the absolute property of the tenant for life. In this instance His Lordship expressly followed *Tardiff* v. *Robinson* (1). This was the law before the statute of 1860; and these decisions were followed by Vice-Chancellor Sir *R. Kindersley*, in *In re Money's Trusts* (2).

The Act of Parliament gives the trustees the power of buying the reversion; and then comes the railway company, and renders the exercise of the power to provide for renewal impossible, by taking away the subject matter.

It is a power; *Hayward* v. *Pile* (3); not a trust.

[On the first point they also cited *Jeffreys* v. *Conner* (4).]

Mr. *Bristowe*, Q.C., for the trustee of the will.

Mr. *Amphlett*, Q.C., and Mr. *Parke*, for the children entitled in remainder:—

There can be no doubt that from and after the 28th of August, 1860, the trustee could have bought the reversion, or sold the lease, under the 38th section. Probably it would be unfair to the tenant for life if he were compelled to contribute more than the renewal fund; but how can it be right to say he is to contribute less? Why should he escape that liability?

Suppose the Dean and Chapter had refused to renew, except on the terms of their being paid three or more years' rental; the renewal fund would have had to be increased. There is no limit assigned by the will to the amount of the renewal fund.

The rights are the same as they would have been if the premises were still the property of the Dean and Chapter, and the same custom of renewal as heretofore were still subsisting. The tenant for life must be charged precisely as he would have been charged if that were so.

All that was decided in *Hayward* v. *Pile* was, that where trustees agree to purchase the reversion upon terms that are highly injurious to the tenant for life, the Court will not sanction the arrangement.

By the 24th section a lessee can compel the Ecclesiastical Com-

(1) 27 Beav. 629, n.
(2) 2 Dr. & Sm. 94.
(3) Law Rep. 5 Ch. 214.
(4) 28 Beav. 328.

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missioners to purchase his term. We ask to be placed in the same favourable position as if the term had been so purchased by the Ecclesiastical Commissioners, instead of by the railway, or as if the Ecclesiastical Commissioners had agreed to sell us the reversion.

Mr. *Fry*, Q.C., and Mr. *Streeten*, for the railway company:—

We ought not to be compelled to pay the costs of this second Petition.

Sir W. M. James, V.C.:—

I desire to hear a reply only on the language of the will. The time there mentioned, namely, "the time for renewal of any estates," will now never arrive. As Mr. *Amphlett* has observed, no definite part of the rental is to be set apart, only "such a part as shall be sufficient for renewal." Does not the testator, when he speaks of "the estates which I hold under the Dean and Chapter," mean so long as he holds such estates under the Dean and Chapter?

Mr. *Jessel*, in reply:—

If the custom of renewal had been in practice at the time of the sale, of course a larger sum might have been demanded. But the custom had ceased.

At the close of the argument the Vice-Chancellor requested a further statement of facts to be laid before him, which was accordingly prepared, and signed by junior counsel on both sides, as follows:—

"It was customary with the Dean and Chapter to grant leases for forty years, renewable every fourteen years.

"The Dean and Chapter ceased to renew leases from Lady Day, 1866, about which time the Ecclesiastical Commissioners took over their estates.

"The rent paid in respect of the lease from the Dean and Chapter of the *Bull* estate was as follows: Rent, £4 18*s.*; land tax, £4; acquittance, 2*s.* 6*d.*; total, £9 0*s.* 6*d.*

"The rent paid in respect of the lease from the Dean and

Chapter of the *Cock* estate was as follows: Rent, £5; land tax, £3 14*s.* 3*d.*; acquittance, 1*s.* 4*d.*; total, £8 15*s.* 7*d.*

"The rental of the *Bull* estate was as follows: Gross rental, £198 16*s.*; less outgoings, rates, taxes, and rent to the Dean and Chapter, £34 18*s.*; net rental, £163 18*s.*

"The rental of the *Cock* estate was as follows: Gross rental, £416 14*s.*; less outgoings, rates, taxes, and rent to the Dean and Chapter, £62 17*s.* 4*d.*; net rental, £353 16*s.* 8*d.*

"Reference is made on behalf of both the Petitioners and the Respondents, the grandchildren, to the 74th section of the *Lands Clauses Act*, 1845.

"Reference is also made on behalf of the above Respondents to the following statutes: 1. 14 & 15 Vict. c. 104 (continued by successive Acts, of which the last is 32 & 33 Vict. c. 85); 2. 17 & 18 Vict. c. 116 (amending 14 & 15 Vict. c. 104), ss. 1 to 4, and 9 to 11, all inclusive; 3. 23 & 24 Vict. c. 124, ss. 20, 24, 25, 29, 35 to 38, both inclusive; and 4. 31 & 32 Vict. c. 114, s. 10."

The following statement was also made by the solicitors for the Respondents, the grandchildren, and certified to be correct by the solicitors for the railway company:—

"Messrs. *Parke & Pollock* have attended Mr. *Bedford*, the clerk of the Dean and Chapter, and inspected the books, shewing the various renewals of the leaseholds in question.

"The fines paid upon each renewal average one year and six weeks' improved rental of the premises. These were the terms upon which the leaseholds in question were renewable at the date of the testator's will; and the trustees of the will have, from time to time, renewed upon the like terms.

"Mr. *Bedford* said the renewals were not 'as of right,' although it was well established that the tenants would be allowed to renew upon payment of the fine."

SIR W. M. JAMES, L.J., on the 3rd of August, 1870, communicated to the parties the following judgment:—

In this case the substantial question raised before me is the right of the tenant for life of leasehold houses held on terms of years—renewable by practice and usage, but not by law—and

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taken by a railway company, to have more than the dividends on the funds produced by the sale to the company.

The Petition asks, in general terms, that the funds may be laid out, invested, and paid, in such manner as will give to the Petitioners interested therein the same benefit therefrom as they might lawfully have had from the same leasehold estates in respect of which the moneys now represented by the sums of stock have been paid.

The argument addressed to me was, that as the renewal had become impossible all trust for renewal had ceased, and the property must now be dealt with as if it were a mere leasehold for a term of years to which the tenant for life was entitled *in specie*, and that, therefore, the tenant for life is entitled to have the whole fund treated as converted into an annuity of duration equivalent to the term, and to have each year one year's payment of the annuity.

The property was held under the Dean and Chapter of *Westminster*, and according to a statement agreed upon, with which I have been furnished, it was customary with the Dean and Chapter to grant leases for forty years, renewable every fourteen years; and the fines paid on each renewal average one year and six weeks' improved rent. These appear to have been the terms on which the leaseholds were renewable at the date of the testator's will.

The testator by his will, dated as far back as 1827, gave the following directions as to his leaseholds:—[His Lordship cited the clause in the testator's will set out above.]

Under this trust the leases have been from time to time renewed; the last renewal of one having been effected in the year 1864, the last renewal of the other having been in 1856; so that the usual time of renewal would have been, as to one, in 1878; as to the other in 1870.

On the 16th day of June, 1865, the company gave the requisite notice to take part of one of the properties, which was met by a counter-notice to take the whole, and thereunder the value of that property was, on the 3rd day of March, 1868, assessed at £3000, which was paid out of Court and invested in £3170 8*s.* 2*d.* New £3 per Cents., and the dividends ordered to be paid to the tenant for

life, whose income was thereby very materially reduced, the net income having previously been £163 18*s.*

On the 9th day of February, 1866, the company gave the requisite notice to take the other property, and thereunder, on the 2nd day of June, 1868, the value was ascertained at £6500. That sum was invested in £6869 4*s.* 5*d.* like annuities, and the dividends thereon were ordered to be paid to the tenant for life; the net income of that property having been £353 16*s.* 8*d.*

By the statement agreed upon, and before referred to, it appears that the Dean and Chapter ceased to renew their leases from Lady Day, 1866, about which time the Ecclesiastical Commissioners took over their estates.

In this state of things it was contended before me, that the case was concluded by two cases of *Richardson* v. *Moore* and *Tardiff* v. *Robinson* (1), both relating to the same property, before Sir *W. Grant* in 1817, and before Lord *Eldon* in 1819; in which a Crown lease was settled, first by a deed of 1766, and afterwards by another settlement made in 1796 of the ultimate beneficial interest under the first settlement, in which there was a proviso that it should be lawful for the trustees, "at the usual and accustomed times, at the request" of the Countess *Tardiff*, and afterwards "at the discretion and proper authority" of the trustees, to renew, or join and concur in renewing, the lease, and to raise the fines by mortgage, or the rents.

The Countess *Tardiff* having power to appoint the property by her will, did so appoint it (subject to certain annuities, and to the powers for raising the money to pay the fines for renewal mentioned in the deed of 1796), in trust to pay the rents to her husband for life, with remainder over; and she declared that if upon any renewal a fund which she referred to, and the rents in hand, should not be sufficient, the annuities were to be suspended until the trustees with the rents should have received sufficient to pay the fines; and there was a further proviso, that if the fine demanded should be excessive or exorbitant the trustees might decline to renew, and the fund set apart—to the full amount of the fines required—should be invested upon the same trusts as the leaseholds.

(1) 27 Beav. 629, n.

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The first suit came on to be heard before Sir *W. Grant*, in which the annuitant under the first settlement claimed to have the other ~~securities~~ and surplus rent suspended and accumulated until a fund should have been provided sufficient to obtain a renewal.

By the answer it was alleged, that the property being required by the Crown no renewal could be obtained.

The bill in this suit was dismissed without costs.

The second suit was instituted by the husband, the tenant for life, claiming the whole of the rents and profits, alleging that certain statutes relating to leases of Crown property had been passed whereby the renewal had become impracticable, and that the Commissioners of Land Revenue had absolutely refused to grant any further term on any conditions whatever. The trustees admitted the allegations, and submitted whether they ought to have accumulated the rents, or any part of them, to form a fund. At the hearing Lord *Eldon* declared, "that as no renewal could be obtained, no accumulation could take place in pursuance of the provisions of the settlement of 1796 and the will of Lady *Tardiff*; and that the Plaintiff was entitled to the rents and profits of the said estates for so much of the residue of the term as he should live, subject to the annuities."

Neither of these cases was reported at the time; no judgment is forthcoming; and we are left without any clue as to the reasoning on which the decision proceeded. They were, however, dug out of the oblivion to which they were consigned by the reporters of the day, for the purposes of a case before the Master of the Rolls, of *Morres* v. *Hodges* (1); and there the Master of the Rolls held himself bound by Lord *Eldon's* decision. In the last-mentioned case the words were, "upon trust to use his and their utmost endeavours to renew upon *reasonable* terms;" and the renewal having become impracticable, the Master of the Rolls held that the trust to provide a fund for such renewal had ceased.

It was also stated to me, that the same conclusion had been arrived at by the Vice-Chancellor *Kindersley* in *In re Money's Trusts* (2), in which case *Morres* v. *Hodges* (3), and *Tardiff* v.

(1) 27 Beav. 625. (2) 2 Dr. & Sm. 94.
(3) 27 Beav. 625.

Robinson (1) were referred to; but it does not appear from the report in that case that there was any question raised upon a trust for renewal, or that there was any such trust.

Now I am of opinion that I am not, in the present case, bound by those cases of *Morres* v. *Hodges* and *Tardiff* v. *Robinson*. In those cases the conclusion arrived at by the Court was, that the tenant for life was entitled *in specie* to the whole rents and profits, charged only with the payment of such a sum as might be required for the renewal, and as no renewal was practicable there was nothing by which the charge could be ascertained, and no means by which any substituted benefit could be ascertained by the Court, to be given to the remainderman.

In this case, however, the primary and paramount intention was "that the estates may be always kept renewed, that the younger children may have an equal benefit of time, and so continue to be provided for, for ever."

If the Dean and Chapter, instead of requiring one year and six weeks' rent, had required two, five, or seven years' rent, the trustees would have had no option but to pay the demand, however exorbitant, unless they had obtained the sanction of the Court to escape from the exorbitance of the demand by making other satisfactory provision for the persons in remainder. No doubt the testator relied on the accustomed liberality of these ecclesiastical bodies; and calculated that his legatees would have the benefit of that liberality. But his paramount object was to have the estate renewed for the equal benefit of all the persons entitled in succession—"and so continue to be provided for, for ever—" and that all of them in succession would have the benefit of that liberality. He intended to create, and was creating, as he thought, a perpetual estate, out of which he was carving successive interests.

In that state of things, the railway company buys the property under its compulsory powers—they buy the leasehold with its chance of renewal. At that time the practice of renewal had not been discontinued. It cannot be assumed that the Dean and Chapter would have been wholly inaccessible to any offer, however liberal, on the part of the trustees. If the full ascertained value of the renewal had been demanded, I do not see how the trustees

(1) 27 Beav. 629, n.

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could have refused to give it—and it is not easy to see how much beyond that would be an exorbitance of demand which would entitle them to come to this Court for its protection and direction.

After the company had given its notices the practice of renewal did cease, and the property was transferred to the Ecclesiastical Commissioners.

But with a view to obviate injustice as much as possible, as between tenants for life and those in remainder of such leases, and to diminish the hardship of the new system, lessees were authorized to buy the reversion at an arbitration, and trustee lessees were empowered to do the same, and to raise the requisite amount by mortgage or sale.

Supposing, in this case, the property had not been taken by the railway company, and when the proper time for renewal came the trustee had found that he could not in terms comply with the will by obtaining perpetual renewals from fourteen years to fourteen years, but that he could obtain once for all a perpetuity in another way by buying the reversion in fee simple, on the moderate terms contemplated by the Legislature, it would, in my judgment, have been his duty to do so.

18 Ch D 631

The result, in my opinion, of the purchase by the railway company is, that one property in perpetuity is substituted for another property in perpetuity; and that, as between the tenant for life and the remainderman, I cannot take away any part of the *corpus* belonging to the latter in order to make good the diminished income of the former.

It appears to me, therefore, that the existing orders of the Court, giving the dividends, and only the dividends, to the tenant for life, are right, and ought not to be disturbed.

In saying this I do not wish to prejudice any application which may be made for the investment of the funds in Court in house property—in public-house property—of the same character as that which has been taken, and which may possibly be found, so as to produce a much larger income than the funds. If it could be possible to find such property, with a perpetual covenant for renewal, I should myself be inclined to listen favourably to an application to invest in such property.

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In re WOOD'S ESTATE.

There is a part of the Petition as to the payment of some costs and expenses incurred by the trustees, and not obtained from the railway company, which I understand to be of course.

I stated that I did not give any costs of the Petition either to or against the railway company.

Solicitors for the Petitioners and others: Messrs. *Burchells.*

Solicitors for the Respondents interested in remainder: Messrs. *Parke & Pollock.*

In re PEDDER'S SETTLEMENT TRUSTS.

V.-C. J.
1870
June 11.

Settlement—Covenant to settle after-acquired Property—Vested Remainder in Land.

By a marriage settlement, the intended wife and husband severally covenanted with the trustees, that in case the marriage should be solemnized, all the estate, property, and effects, both real and personal, which the husband and wife, or either of them, in right of the wife, "shall at any time or times during the said intended coverture become seised or possessed of, or entitled to," should be settled.

At the date of the settlement and of the marriage the wife was entitled to a vested remainder in land, expectant on the death of a tenant for life, who outlived the coverture:—

Held, that the land was not subject to the trusts of the settlement.

PETITION.

By an indenture dated the 21st of May, 1853, and made between *Mary Ann Mainwaring* of the first part, *Robert Vaughan Hughes* of the second part, and *William Gunning* and *Thomas Bush Saunders* of the third part, being a settlement made in contemplation of the marriage of *M. A. Mainwaring* and *R. V. Hughes*, a remainder in fee of *M. A. Mainwaring*, expectant on the decease of *Rowland Mainwaring*, her father, in one undivided eighth part or share, and all other the part, share, estate, right, and interest of *M. A. Mainwaring* of and in the manor of *Lambourn Deanery*, in the county of *Berks*, and a rectory and tithes, were granted to *W. Gunning* and *T. B. Saunders*, and their heirs, upon the trusts of the settlement.

By another indenture of even date, and made between the same

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parties, being a further settlement made in contemplation of the same marriage, it was agreed that the trustees should stand possessed of certain specified sums of stock (as to one of them subject to the life interest of *Rowland Mainwaring* therein) upon the trusts of the settlement. The deed also contained the following covenant:—

"And this indenture further witnesseth, that in pursuance of an agreement in that behalf, and for the considerations aforesaid, each of them the said *Robert Vaughan Hughes* and *Mary Ann Mainwaring*, for himself and herself, and his and her heirs, executors, and administrators, doth hereby covenant with the said *William Gunning* and *Thomas Bush Saunders*, their executors, administrators, and assigns, in manner following (that is to say), that in case the said intended marriage shall be solemnized, all the estate, property, and effects whatsoever, both real and personal, which the said *Robert Vaughan Hughes* and *Mary Ann Mainwaring*, or either of them, in right of the said *Mary Ann Mainwaring*, shall at any time or times during the said intended coverture become seised or possessed of, or entitled to, either at law or in equity, by any means whatsoever (except personal estate or property the entire value whereof shall be less than £100) shall be assured and settled, and that the said *Robert Vaughan Hughes* and *Mary Ann Mainwaring* respectively, at the costs of the trust estate, shall do and execute, and concur in doing and executing, all such acts and deeds whatsoever as by the said trustees or trustee for the time being, or their or any of their counsel, shall be reasonably required for assuring and settling the same real and personal property (except as aforesaid), and every part thereof, for all the estate and interest of the said *Robert Vaughan Hughes* and *Mary Ann Mainwaring*, or either of them, therein, upon the trusts and in manner hereinafter expressed concerning the same respectively."

The marriage took place on the 26th of May, 1853.

By an order of the Court made in the matter on the 16th of December, 1854, it was declared that upon the death, on the 28th of December, 1846, of one *John Withers Clark*, *Mary Ann Hughes*, then *Mainwaring*, became entitled, as one of his two co-heiresses-at-law, to a sixteenth share in a sum of stock, representing the sale moneys of real estate, absolutely, subject to the life interest therein

of one *Rebecca Maurice*. In a former proceeding in the same matter it had been held that this fund was real estate (1).

Mary Ann Hughes died on the 14th of January, 1865; and *Rebecca Maurice* died on the 28th of June, 1867, so that the remainder did not fall into possession during the coverture.

The principal question argued on this Petition was, whether or not this remainder (which exceeded £100 in value) was included within the above covenant.

Mr. *Bush*, for the Petitioners, one of whom was the heir-at-law of Mrs. *Hughes* :—

This property did not fall within the covenant to settle after-acquired property, but passed to the heir-at-law. The important words are, "shall during the coverture become seised or possessed of, or entitled to."

[He cited and commented on the following authorities: *Grafftey* v. *Humpage* (2); *James* v. *Durant* (3); *Blythe* v. *Granville* (4); *Ex parte Blake* (5); *In re Hughes' Trusts* (6); *Hoare* v. *Hornby* (7); *Wilton* v. *Colvin* (8); *Archer* v. *Kelly* (9); *In re Browne's Will* (10).]

The VICE-CHANCELLOR referred to *Otter* v. *Melvill* (11).

Mr. *Bush* :—The result of the whole seems to be, that an estate which did not become vested in possession during the coverture, though it was vested in title the whole time, is not within these words.

Mr. *Wiglesworth*, for Respondents claiming under the settlement :—

The property has been converted into personalty.

The VICE-CHANCELLOR (on the facts) overruled this argument, and said it was unquestionably real estate.

Mr. *Wiglesworth* :—If so, it is a vested remainder of or to which

(1) 5 D. M. & G. 890.
(2) 1 Beav. 46.
(3) 2 Ibid. 177.
(4) 13 Sim. 190.
(5) 16 Beav. 463, 470.
(6) 4 Giff. 432.
(7) 2 Y. & C. Ch. 121.
(8) 3 Drew. 617.
(9) 1 Dr. & Sm. 300.
(10) Law Rep. 7 Eq. 231.
(11) 2 De G. & Sm. 257.

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the wife was possessed or entitled "during the coverture," i.e., she became so from the first instant of her marriage. There is no necessity that the property should fall into possession during the coverture in order that it should be bound: *Ex parte Blake* (1); *In re Hughes' Trusts* (2).

Mr. *Charles Burrell*, for the children of the marriage and the trustee of the settlement.

SIR W. M. JAMES, V.C.:—

6 L.D. 623. I think this case is virtually decided by authority.

The words of the covenant are words of futurity: "shall during the coverture become seised or possessed of, or entitled to;" and I find nothing to warrant a departure from the literal and natural meaning of the words.

18 Eq. 443. This is not property with regard to which it can be averred that the husband or the wife did become "seised or possessed of, or entitled to" it, "during the coverture." No seisin, no title accrued to either of them in respect of it during the coverture; hence the property does not satisfy the words of futurity in the covenant, and consequently was not included within it.

MINUTES:—"This Court being of opinion that the one-sixteenth to which *Mary Ann Vaughan Hughes* was entitled as one of the co-heiresses-at-law of *John Withers Clark*, was not affected by the covenant in her settlement, dated the 21st day of May, 1853, to settle after-acquired property, doth order," &c.

Solicitors for all Parties: Messrs. *Merriman & Pike.*

(1) 16 Beav. 463. (2) 4 Giff. 432.

AITCHISON *v.* DIXON.

V.-C. J.
1870
June 6, 7, 24.

Domicil—Domicil of Origin—Abandonment—Reduction into Possession.

The rule that a man will be considered as domiciled in the place where his wife permanently resides, and in which he has fixed his establishment, is not affected by the circumstance that the choice of residence has been made in deference to the wishes of the wife, and that the house has been bought and furnished at her instance and with her money.

A fund to which a married woman becomes entitled during coverture will not be considered as reduced into possession by the husband where he has not been at any time in a position to assert his rights by action for the amount as money had and received to his use.

A., being sole executor and trustee of *X.*'s will, appointed *B.* and *C.* as his co-trustees, and by deed assigned all *X.*'s property to himself, *B.*, and *C.*, upon the trusts of the will. *B.* (who was also *A.*'s solicitor), as trustee opened an account at a bank in the name of "The Executor of *X.*" A share of *X.*'s estate, to which *A.*'s wife, or *A.* in her right, was entitled, having become divisible, *B.*, after advising her as to an investment, drew a cheque in his own name in favour of *A.*'s wife, and the money was invested in a debenture which was taken in the names of *B.* and *D.* as trustees for her:—

Held, that there had been no reduction into possession of the share by *A.*

THIS was a suit by the legal personal representatives of *William Allan*, deceased, for the purpose of recovering a share of the lapsed residuary personal estate of *John Gott*, deceased, which became divisible among his next of kin, one of whom was the Defendant Mrs. *Allan*, during the lifetime of the said *William Allan*, her husband.

The circumstances of the case are so fully detailed in the judgment, that it will be sufficient to state that the claim on behalf of the Plaintiffs was rested upon the following grounds, as stated in the bill:—

1. That *William Allan* being domiciled in *Scotland* at the time of his marriage with the Defendant, Mrs. *Allan*, in 1829, and continuing so domiciled down to his death in 1868, he was, according to the law of *Scotland*, entitled to all personal property which accrued to her during the subsistence of the marriage, whether reduced into possession by him in the lifetime of his wife or not, and entitled *jure mariti* to the distributive share to which she as one of the next of kin of *John Gott* was entitled of his

V.-C. J. 1870

AITCHISON v. DIXON.

residuary personal estate, whether reduced into possession during *Allan's* lifetime or not.

2. That whether *William Allan* was domiciled in *Scotland* or not at the death of *John Gott* in 1867, or afterwards, there had been, in fact, a reduction into possession by *Allan* during his lifetime of the £7000, the share of Mrs. *Allan* in that part of *John Gott's* personal estate which became divisible before the death of *Allan*.

On the other hand, the Defendants contended that the domicil of *William Allan* had ceased to be Scottish not later than December, 1841, and was English down to his death; that the £7000 was not reduced into possession by him during his lifetime, so that on his death Mrs. *Allan* became, and now was, absolutely entitled not only to her share of the outstanding personal estate of *John Gott*, but also to the £7000. It was also contended on behalf of the Defendants, that even if *William Allan* died a domiciled Scotchman, or even if there had been a reduction into possession of the £7000 by *Allan* during his lifetime, *Allan*, by force of the provisoes contained in his marriage settlement (executed in the Scotch form) had precluded himself and his representatives from claiming against Mrs. *Allan* any part of her personal estate, whether reduced into possession in his lifetime or not.

Mr. *Anderson*, Q.C., Mr. *Kay*, Q.C., and Mr. *Mounsey*, for the Plaintiffs, upon the contention that *William Allan's* Scotch domicil of origin had never been abandoned, referred to *Munro* v. *Munro* (1), *Aikman* v. *Aikman* (2), *Udny* v. *Udny* (3), *Moorhouse* v. *Lord* (4), and *Haldane* v. *Eckford* (5).

[The VICE-CHANCELLOR referred to *Forbes* v. *Forbes* (6).]

The *jus mariti* was not excluded, and the rights of the parties under the marriage contract must be governed by the law of the domicil: *Duncan* v. *Cannan* (7); and that, consequently, according to Scotch law, the representatives of the husband, and not the widow, were entitled to any property that accrued to the wife

(1) 7 Cl. & F. 842.
(2) 3 Macq. 884.
(3) Law Rep. 1 H. L., Sc., 441.
(4) 10 H. L. C. 272.
(5) Law Rep. 8 Eq. 631.
(6) Kay, 341.
(7) 18 Beav. 128.

during the marriage: *Leslie* v. *Baillie* (1). Upon the question of reduction into possession they cited *Wombwell* v. *Laver* (2).

Mr. *Fry*, Q.C., Mr. *Marten*, and Mr. *Forbes* (Sir *Roundell Palmer*, Q.C., with them), for the Defendants, were not called upon to argue the question of domicil.

Upon the question of reduction into possession by *William Allan*, and in support of the proposition that his legal right was controlled by the equitable right of his wife, they cited *Ex parte Norton* (3), *Sturgis* v. *Champneys* (4), *Bond* v. *Simmons* (5), *Burdon* v. *Dean* (6), and *Blount* v. *Bestland* (7).

The settlement of 1829 must be construed according to its obvious import: *King of Spain* v. *Machado* (8); *Este* v. *Smyth* (9); and the particular provision was intended to keep property accruing to the wife from becoming common property, and, as such, subject to the administration of the husband.

Mr. *Anderson*, in reply.

June 24. SIR W. M. JAMES, V.C.:—

The question in this suit is, whether the Plaintiffs, as the representatives of a deceased husband, or the Defendant, the surviving wife, are entitled to a large sum of money, part of the estate of one *John Gott*, deceased. *John Gott* died seised and possessed of property of great value, the residue of which he had bequeathed by his will to a brother. The brother having predeceased him, there was a lapse of that gift. Mrs. *Allan*, the Defendant, then the wife of one *William Allan*, was one of the next of kin of *John Gott*, and as such entitled to a share of that lapsed bequest. She alleges that the domicil of her deceased husband at his death was English, and that he having died without reducing the property into possession, her right by survivorship attached; and she contends, further, that by the terms of an ante-nuptial settlement, and independently of

(1) 2 Y. & C. Ch. 91.
(2) 2 Sim. 360.
(3) 25 L. J. (Bky.) 43.
(4) 5 My. & Cr. 97.
(5) 3 Atk. 20.
(6) 2 Ves. 607.
(7) 5 Ves. 515.
(8) 4 Russ. 225.
(9) 18 Beav. 112.

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the reduction into possession, the husband had effectually precluded himself from all marital rights in respect of the property which had so devolved on her.

On the other side, it was contended that the domicil at the death was Scotch; that there was a reduction into possession of a considerable sum, which had effectually vested the property in the husband *jure mariti* prior to his death; and that the settlement, according to its true construction, did not affect the marital right. The Plaintiffs did not, however, contend that the settlement, *proprio vigore*, gave the husband any right to that particular property. Their claim was based on the operation of the Scotch law on a Scotch domicil.

The first and most material question to be disposed of is the question of domicil.

The testator's domicil of origin was undoubtedly Scotch. He was born and bred in *Scotland*. He was the head of a good Scotch family. He was a considerable landed proprietor in *Scotland*, and a banker in *Edinburgh*, was a citizen of that city, and was selected to fill the office of Lord Provost. He came, however, in the year 1829, to *England*, for a wife, being then of the ripe age of forty, and had the good fortune to win the hand of a widow lady of considerable wealth and expectations, who was six years his junior. He took her with him to *Scotland*, and there can be no doubt that the conjugal home and domicil were intended to be, and originally were, Scottish. At this time *W. Allan* had two Scotch residences, one a country-house at a place called the *Glen*, his patrimonial estate, and another at a house No. 11, *Hillside Crescent*, a crescent built on a property called *Hillside*, also his patrimonial estate, which had become valuable as building land. In the year 1833, Mr. and Mrs. *Allan* went abroad, giving up the *Hillside Crescent* house, and travelled about until the year 1836, when they returned and resumed their residence at the *Glen*, and so resumed their Scotch home and domicil. At the end of 1841, Mr. and Mrs. *Allan* again left *Scotland*, and spent the year 1841 in various parts of *England* and *Wales*, but without any fixed residence. In 1843, Mr. *Allan*, being a great sufferer from gout, went to *Buxton*. In that year he, or, as the Plaintiffs put it, Mrs. *Allan*, took a furnished house at *Wyebridge*, near *Buxton*, and

thereupon Mrs. *Allan* removed all her furniture which was at the *Glen*, and which appears to have constituted the furniture of that house, to the *Pantechnicon* at *London*, and thereupon the *Glen* was given up and let to another brother, and Mr. and Mrs. *Allan* ceased to have, and never again had, any house or home in *Scotland*. After residing for some time in the house at *Wyebridge* as a furnished house, Mrs. *Allan's* trustees were induced to lay out a portion of her money in the purchase of it. Such a purchase, there can be no doubt, was made, not by way of profitable investment of trust moneys, but with a view to permanent residence, and Mrs. *Allan's* furniture was thereupon brought to this house. This house so furnished was retained until the year 1858, and although not occupied by them during the greater part of that time, their servants were always left there, and the furniture left there, so as to be at all times available for residence. From 1841 to 1852, Mr. *Allan* never was in *Scotland*. In 1852, Mr. *Allan's* brother and partner became incapacitated for business, and Mr. *Allan*, in February of that year, returned to *Edinburgh* and resumed his place at the bank. His health did not permit him to remain there permanently, and in the month of June, 1852, he was compelled to abandon all hope of pursuing his vocation, and he left *Edinburgh* and *Scotland*, and never afterwards returned there except for a few short visits.

Mr. *Allan's* disease, the gout, about this time flew to his head and affected his mind. He was, in the summer of 1853, placed in a private asylum. He was then removed to an asylum at *Hanwell*, where he remained until March, 1854.

From this period the narrative may be given in the language of Dr. *Corsellis*, the medical attendant of Mr. *Allan*:—"In March, 1854, Mr. *Allan* left the said private asylum at *Hanwell* and proceeded to travel on the Continent, accompanied by me. Mr. *Allan's* medical advisers at this time considered that complete change of air and scene would be most conducive to his recovery, and I was requested by his friends to accompany him on his journey. Mr. *Allan* and I remained on the Continent for upwards of two years, until some time in or about March, 1856, when we returned to *England*. During the time when we were on the Continent we visited various places on the Continent, and spent two winters at

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Boulogne. On returning to *England* in 1856, Mr. *Allan* and I joined Mrs. *Allan* at the *Queen's Hotel, Norwood*, and I left him there. A few months afterwards, and in the same year, 1856, I received a request from Mrs. *Allan* to join her and Mr. *Allan* again at *Ryde*, and accordingly I did so, and I went with them from *Ryde* to *Dover*, and thence to *Torquay*. We remained at *Torquay* a few days only, the place not being considered suitable for Mr. *Allan* in his then state of health. From *Torquay* we went to the *Bedford Hotel* at *Brighton*. Whilst at the *Bedford Hotel* at *Brighton*, on this occasion, I accompanied Mr. *Allan*, at his request, to a house agent to inquire for a house at *Brighton*. Mrs. *Allan*, however, had already taken a furnished house, No. 50, *Marine Parade*, and we removed from the *Bedford Hotel* to that house, and remained and spent the winter of 1856-7 at No. 50, *Marine Parade, Brighton*, accordingly. In the year 1857, Mr. and Mrs. *Allan* and myself visited *Windermere*, where a house had been taken for Mr. and Mrs. *Allan*, and we remained there until the autumn of that year. During the summer of 1857, and while we were at *Windermere*, Mrs. *Aitchison*, the sister of Mr. *Allan*, Mrs. *Aitchison's* daughters, and her son the Plaintiff, *William Aitchison*, now Colonel *Aitchison*, visited Mr. and Mrs. *Allan* there. In the latter part of the summer or autumn of 1857, Mr. and Mrs. *Allan* and myself returned to a hotel at *Brighton*, where we remained a short time, and until they removed into *Harwood House, Brighton*, which was a furnished house, and thenceforward we lodged there during the winter of 1857-8. In the year 1858, the house No. 7, *Chichester Terrace, Brighton*, was taken, and while it was in preparation for occupation and until the removal there of Mrs. *Allan's* furniture, which was at their house at *Buxton*, Mr. and Mrs. *Allan* and I went first to *Red Hall, Forest Hill*, and thence to *Tunbridge Wells*, and at the latter place we occupied a furnished house in *Calverley Park*. In October, 1858, we removed from the house in *Calverley Park, Tunbridge Wells*, to the house, No. 7, *Chichester Terrace*, and Mr. *Allan* continued to reside there until his death on the 6th of July, 1868."

The only addition to this narrative which it is necessary to make is, that the house at *Brighton* was bought by the trustee of Mrs. *Allan*, and that thereupon the *Wyebridge* house was sold, and the

furniture removed from it to the *Brighton* house. Mr. *Allan* being then seventy and Mrs. *Allan* sixty-four, they settled down at *Brighton* in a house purchased in order that it might be their future residence.

In the year 1853, Mr. *Allan's* affairs were placed by the Court of Session in *Edinburgh* in the hands of a *curator bonis*, and he so continued under the protection of that Court until the year 1859, when the Court was satisfied that he had recovered so as to be able to manage his own business. He appointed one Mr. *Sprott* his factor and commissioner. His landed property was heavily incumbered, or, at all events, he was largely indebted, and partly by his *curator bonis*, and partly by his factor and commissioner after his mental recovery, the *Glen* estate, his favourite property, was sold, and that not being sufficient, a very large portion of his *Hillside* property had to be sacrificed, and the residue still remained incumbered, so that at the time of his death his own net income was little, if at all, more than £500 a year; and if he had returned to *Scotland* on his own means, the former Lord Provost and banker, the Laird of the *Glen* and of *Hillside*, would have so returned, comparatively, a broken man. His wife's income was £3000 a year, He seems, however, to have clung to his territorial distinctions. He was long Mr. *Allan* of the *Glen* and of *Hillside*—then, and to the last, Mr. *Allan*, of *Hillside*—he retained some of the old superiorities in more than one county, which had in the pre-Reform era entitled him to be placed on the roll of freeholders. And claiming his place as a citizen of *Edinburgh*, and being a zealous Conservative, he, in the last year of his life, went down hoping to be present at a great banquet there given to Mr. *Disraeli*. Unfortunately he took cold; a fatal bronchitis set in, and he returned to his home at *Brighton*, where he died in the year 1868. He was buried at a burying-place near *Brighton*, which, according to Mrs. *Allan's* testimony, he had, some considerable time previously, selected as his last resting-place.

This history seems to me to bring the case completely within that of *Forbes* v. *Forbes* (1) with this distinction, making this case stronger, that in that case General *Forbes* had actually a residence in *Scotland*, where he resided a great part of each year, had an

(1) Kay, 341. 10 Jur 643

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establishment, and was actually engaged in performing the territorial, the magisterial and other duties of a great Scotch laird; but which were held not to countervail the fact that his English house was the conjugal residence.

It is, however, contended in this case that there is this difference: that from Mr. *Allan's* state of health, mental and bodily, the choice of residence was really not his but that of his wife, upon whom both his pecuniary means and his condition made him so dependent; who appears to have watched over him herself; to have provided him with attendants and a physician; and to have spent her large income liberally in providing him with every comfort his condition was capable of.

It is clear, however, that except during the interval between 1853 and 1859 he must be considered as of perfectly sound mind; indeed, in the latter ten years of his life, when he was unexpectedly called upon to perform the duties of an executor and trustee of a large estate, he shewed himself a singularly active and intelligent man of business. Being of sound mind, it was he, of course, who was the head and master. The comparative opulence of the wife can make no difference. The residence and home at *Brighton* were not the less his because he may have deferred, however implicitly, to her wishes. It indeed makes the conclusion in favour of a *Brighton* domicil irresistible when we find that it was in the highest degree improbable that the wife should ever have voluntarily returned to a Scotch home; that the husband had every motive of interest, of gratitude, and of affection to say to his partner, "Your country shall be our country, the home of your selection shall be our home." The suggestion that he, possibly or probably, would have returned to his Scotch relations in the very improbable event of his surviving her, seems to me of no weight, even if there were, which there is not, evidence of any such intention. When she, at the age of sixty-four, bought and furnished the house at *Brighton* I have no doubt she bought it to be their permanent home, and I have no doubt that he, the grateful and dependent invalid of seventy, meant there to live the rest of his life by her side, there to die in her arms, to be removed to the resting-place close by which he had selected. I have no doubt, therefore, that the domicil was English and not Scotch.

The domicil being English, then next arises the question of the reduction into possession. This question arises in this way:—Mr. *Allan* was himself the sole surviving executor and trustee of Mr. *John Gott's* will. By the frame of that will, subject to certain specific and other bequests, the whole personal estate of *John Gott* was bequeathed to the trustees. Finding himself the sole executor and trustee, Mr. *Allan* appointed two gentlemen, Mr. *Ewart* of *Liverpool*, and the Defendant *Dixon*, to be co-trustees with him, and, by a deed, he conveyed and assigned all the freehold property and all the personal property of the testator to himself and the other trustees upon the trusts of the will. This, of course, did not denude him of his character or of his responsibilities as executor, but was an assent to the bequest on trust, and was as complete an assignment of the personal estate as it was possible for an executor to make. The execution of this deed was followed by the institution of a suit by Mr. *Allan*, in the name and right of himself and wife, against the trustees for the administration of the estate, in which there was the usual administration decree. The Defendant *Dixon* was resident near *Leeds*, where Mr. *John Gott's* property, to a great extent, lay; and he was not only a trustee, but his firm of *Benjamin Dixon & Son* were the solicitors of Mr. *Allan*.

An account was opened at the *Leeds Bank* in the name of "The Executor of *John Gott*." This account, however, was opened by the Defendant *Dixon*, the trustee, and he has deposed that he did it as trustee, that he, when he opened it, informed the manager that he alone was to draw upon it. Accordingly, all cheques upon that account were drawn by him. There being considerable sums to that account divisible amongst the persons beneficially interested he proceeded to divide them, and he ascertained that £7000 was the *quota* of the share which Mrs. *Allan*, or Mr. *Allan* in her right, was entitled to of the lapsed residue. Mr. *Allan* appears to have been very unwell at that time, and Mrs. *Allan* was communicated with, and was advised as to the investment of that sum, and acquiesced in such advice. Thereupon a cheque was drawn by the Defendant *Dixon*, in his own name, to Mrs. *E. Allan* or bearer; the printed words "or order" being struck out; but those words having been there the cheque was apparently not considered negotiable without her indorsement. Mr. *Dixon*, jun., thereupon indorsed the cheque

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"*E. Allan.*" With that cheque the investment was at once made, and the cheque having passed through a bank at *Sheffield*, was honoured by the *Leeds Bank;* the amount being debited to the account of "the Executor of *John Gott.*" The investment consisted of a debenture of the *South Yorkshire Railway and River Dun Company*, which was taken in the names of the Defendant *Dixon* and *Joseph Christopher Ewart*, as trustees for Mrs. *Allan*. It is contended that the £7000 being actually drawn for in Mr. *Allan's* lifetime by Mr. *Allan's* solicitor, was effectually severed from the estate; that the cheque was drawn in payment of the share, and being in the hands of the solicitors of Mr. *Allan* was in their hands as his cheque and property, and so reduced into possession as if it had been placed to his private account in the same bank; that the investment of it by direction of his wife, without his knowledge, could not alter the property; and that such investment, being made with moneys which had so become his, is part of his estate. I cannot accede to this view. Whether rightly or wrongly, the cheque was drawn, not for him in his marital right, but for his wife as distinguished from him, and there never was a moment of time at which he could have brought an action against any person for the £7000 as moneys had and received to his use. The utmost he could, or his representatives can, claim would be to treat the transaction as unauthorized, and to insist on the £7000 being replaced in the bank as if it had never been drawn against; in which case it is clear that it would have been part of the unadministered residuary estate under the control of the trustees at his death, not reduced into possession by him, and passing clearly by survivorship to his widow.

Having thus answered the question of domicil and the question of reduction into possession in favour of the widow, it is not necessary to consider any question as to the marriage settlement. The bill of the Plaintiffs must be dismissed, but, under the circumstances, dismissed without costs.

Solicitors: Messrs. *Sharp & Ullithorne;* Messrs. *Baxter, Rose, Norton, & Co.*

In re DE LA TOUCHE'S SETTLEMENT.

V.-C. J.
1870
June 25.

Marriage Settlement—Mistake—Rectification—Petition—Form of Order.

By a mistake in pencil directions given to a clerk or stationer, a clause of a sentence was inserted in a marriage settlement which on the face of the deed was repugnant to the sense, and which led to a highly improbable result. The fact of the mistake was not admitted by all parties:

The Court, on Petition under the *Trustee Relief Act*, did not order the settlement to be rectified; but, prefacing the order with a declaration that it appeared that the words in question were inserted by mistake, made an order for distribution of the fund as if the clause had not been inserted.

PETITION.

By a post-nuptial settlement, dated the 15th of April, 1847, and made between the Rev. *John William De la Touche*, clerk, (then and therein called *John Latouche*), and *Henrietta* his wife, of the first part, the Rev. *William Sheepshanks Burgess*, clerk, the father of *Henrietta Latouche*, of the second part, and two trustees of the third part, it was declared that the trustees should stand possessed of a sum of £5416 7*s.* 9*d.* (not the subject of the present Petition), upon trust, after sale of a portion and payment thereout of costs, to invest the residue as therein mentioned, and pay the income to *John Latouche* and his assigns for life, and after his decease to *Henrietta Latouche* and her assigns for life, and from and after the decease of the survivor, (*A.*) "in case the said *Henrietta*, his said wife, shall be such survivor," upon trust for the children of the marriage, in manner therein mentioned (*B.*); "but in case the said *Henrietta Latouche* shall die in the lifetime of the said *John Latouche*," then upon trust for all the children of the marriage, as *John Latouche* and *Henrietta* his wife should jointly by deed appoint; in default, as *Henrietta Latouche* should by will appoint; in default, for all the children of the marriage who should attain twenty-one, in equal shares; but if no child should attain twenty-one, in trust for *William Sheepshanks Burgess* (the father of *Henrietta Latouche*), his executors, administrators, and assigns. Then followed usual hotchpot, advancement, maintenance, and accumulation clauses; and a covenant to settle after-acquired property.

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The deed then witnessed that *John Latouche* and *Henrietta* his wife thereby severally covenanted with the trustees, that *John Latouche* should and would, either alone or in concurrence with his wife, at the costs of the trust estate, do all acts as should be necessary to vest in the trustees (a fund which was the subject of the present Petition, namely) all the present or future share and interest of *Henrietta Latouche* or of *John Latouche*, as her husband, of and in a sum of consols, whatever amount it might be, standing in the names of the trustees of the will of the Rev. *James Burgess* at the time of the death of *W. S. Burgess;* and also all the real and personal estate to which *Henrietta Latouche* or *John Latouche*, as her husband, was entitled under the will of *Edward Goode;* and also a sum of £1000 then lent out on mortgage, in pursuance of the trusts of the marriage settlement of *W. S. Burgess*, to which *Henrietta Latouche* or *John Latouche*, as her husband, was or should be entitled after the decease of her father; and all other the real or personal property whatsoever not therein otherwise comprised to which *Henrietta Latouche* should at any time during the coverture become entitled by descent, transmission, or otherwise, from her sister *Emily*, in case she should die under the age of twenty-one, under the wills of *James Burgess* and her mother *Henrietta Goode Sheepshanks* respectively; upon trust to indemnify the trustees in respect of the trusts, and to levy such sums of money as would be sufficient to pay and satisfy their costs, charges, and expenses; and to invest the residue in some or one of the classes of securities therein specified, with power to vary securities; and stand possessed of the funds, upon trust to pay the income to *John Latouche* for life; "and after his decease do and shall pay the said interest, dividends, and annual produce to or permit the same to be received by the said *Henrietta Latouche* and her assigns during her life; and from and after the decease of the survivor of them the said *John Latouche* and *Henrietta* his said wife, (*E.*) in case the said *Henrietta*, his said wife, shall be the survivor (*F.*), then do and shall stand and be possessed of and interested in all and singular the said trust moneys, stocks, and securities, and the dividends, interest, and annual produce thereof, in trust for all and every or such one or more exclusively of the others or other of the children of the said marriage," as *John Latouche* and

Henrietta his wife should by deed jointly appoint; and in default of such appointment, in trust for all the children of the marriage who should attain twenty-one, in equal shares; "and subject and without prejudice to the trusts aforesaid, then upon the trusts following, that is to say, in case there shall be no child of the said marriage who shall attain a vested interest in the said last mentioned sums of money, trust stock, and property, then the same shall be held" upon such trusts as *Henrietta Latouche* should, notwithstanding coverture, by will appoint; and in default of such appointment, "in trust for all and every the future child or children, if any, of the said *John Latouche* by any future wife, at the same ages and times, and subject to the same powers, provisoes, and declarations, as to maintenance and advancement, and otherwise," as were contained therein with reference to the children of *John Latouche* by *Henrietta Latouche;* and subject thereto, in trust for such persons as at the decease of the said *Henrietta Latouche* would have become entitled thereto under the *Statute of Distributions*, in case she had died possessed thereof intestate, and without having been married, as tenants in common, and in the shares in which they would have been entitled under the same Statute.

Henrietta Latouche died on the 30th of December, 1847, without having made any joint or separate appointment under the above powers, in the lifetime of her father, her husband, and two sons, the only issue of the marriage, namely, *Cecil Treville De la Touche* and *Villiers De la Touche.*

In November, 1850, *John William Latouche,* then *De la Touche,* married *Louisa Fanny Wale.*

On the 6th of May, 1853, *W. S. Burgess* died.

On the 5th of August, 1868, *Villiers De la Touche* died, and administration of his estate and effects was granted to his father, *J. W. De la Touche.*

J. W. De la Touche died on the 9th of February, 1870, leaving his widow, and one daughter, *Fanny Eva,* the only issue of the second marriage, surviving him.

In June, 1870, the trustees of the settlement transferred into Court a sum of £5187 2*s.* 5*d.* consols, representing the property which had been paid to them under the last-mentioned covenant

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in the settlement, upon an affidavit which stated that, upon the death of *J. W. De la Touche*, a difficulty arose as to the parties entitled to the fund, such difficulty being caused by the occurrence in the settlement of the words, from (*E.*) to (*F.*) above, "in case the said *Henrietta*, his said wife, shall be the survivor;" and that the persons who might claim an interest in the fund were four: first, *Cecil De la Touche*, the administrator *de bonis non* of *Villiers De la Touche*, who might contend that the above words should be rejected or struck out; secondly, the administrator of *Henrietta Latouche*, on the ground that there was a resulting trust for her; thirdly, *Fanny Eva De la Touche*, on the ground that the contingency extended to the trusts of the children only of the first and not of the second marriage; fourthly, the executors of the will of *W. S. Burgess*, as the persons who at the death of *Henrietta Latouche* would have been entitled to her personal estate under the *Statute of Distributions*.

This Petition was presented In the Matter of the *Trustee Relief Act* and of the Settlement Trusts, by *Cecil De la Touche;* the Respondents being, the trustees of the marriage settlement, *Fanny Eva De la Touche*, the executors of *W. S. Burgess*, the administrator *de bonis non* of *Villiers De la Touche* (when appointed), and the administrator *de bonis non* of *Henrietta Latouche* (when appointed).

It stated that the Petitioner was advised that the above words, from (*E.*) to (*F.*), "in case the said *Henrietta*, his said wife, shall be such survivor," ought to be rejected, as being repugnant to and inconsistent with the rest of the settlement; and further, that if the Court should be of opinion that the words should not be rejected, yet that there were materials for reforming the settlement, first, by shewing from the original draft that the words in question were introduced by means of a pencil direction referring the clerk or stationer to that part of the trusts of the £5416 7*s.* 9*d.*, (*A.*) to (*B.*), which contained provisions for the event of the wife's surviving, as altered in pencil; but that the pencil alterations omitted to strike out the words in question; secondly, an epitome of the settlement made out by the solicitors and furnished to the parties after the execution.

The Petition stated that the Petitioner undertook, if necessary,

to file a bill for the reformation of the settlement; and prayed, in substance, for the transfer and payment out of the stock and cash in Court to the personal representative (when constituted) of *Villiers De la Touche,* and himself, in moieties.

Mr. *Kay,* Q.C., and Mr. *A. Smith,* for the Petitioner:—

The Court has jurisdiction, upon a Petition under the *Trustee Relief Act,* to rectify a settlement: *In re Hoare's Trusts* (1); *Lewis* v. *Hillman* (2).

The Vice-Chancellor said that one instance of the Court having acted in the way proposed would be sufficient authority.

Mr. *Kay,* and Mr. *Smith,* read the evidence in support of the allegations in the Petition.

Mr. *Speed,* for the child of the second marriage:—

Rectification can only proceed on admission by all parties of the fact of a common mistake. Appearing for an infant, I cannot admit the existence of any mistake.

Mr. *Hastings,* for the executors of the will of *W. S. Burgess.*

Sir W. M. James, V.C.:—

Inspection of the deed alone is sufficient to lead to a presumption of a mistake, which is abundantly established by the evidence.

Very slight evidence would be sufficient to satisfy me that there could have been no intention that children of a first marriage should be deprived of their mother's property, in order that it might go to the children of a second marriage.

The order will be prefaced with the recital that, "it appearing that the words" (stating them) "were inserted in the settlement by mistake, this Court doth order," &c.

The order will be as prayed, and the costs of all parties will come out of the fund.

Solicitors: Messrs. *Boys & Tweedies.*

(1) 4 Giff. 254. (2) 3 H. L. C. 607.

V.-C. J.
1870
May 30;
June 27.

TRAPPES *v.* MEREDITH. (No. 2.)

Scotch Sequestration—Discharge—Annuity—Forfeiture.

Subject to the life-interest therein of *X.*, property was devised to trustees, upon trust thereout to pay an annuity of £100 to *A.* (husband of testatrix) during his life, with a direction that if *A.* should become bankrupt, or should assign, charge, incumber, or suffer any act whereby the same would, if belonging absolutely to him, become vested in any other person or persons, then and in such case the said annuity should not be payable, or should cease to be payable, as the case might require, in the same manner as if *A.* was dead; with a further direction that it should be lawful for her trustees in their discretion, and without assigning any reason for so doing, at any time to refuse or discontinue payment of the annuity to *A.* during the whole or any portion of his life.

Two years before the date of the will, *A.* was, with the knowledge of the testatrix, adjudged bankrupt under a sequestration according to Scotch law.

X. survived the testatrix, and died on the 4th of April, 1868. On the 29th of August, 1868, *A.* obtained his discharge under the sequestration, and on the 10th of February, 1869, the trustee under the sequestration was discharged from his office of trustee :—

Held, that the Scotch sequestration was not a forfeiture within the meaning of the clause of forfeiture, and that the annuity was subject to the absolute discretion of the trustees of the will as to the payment to *A.*

Reversed by L. C. 7 Ch 248.

THIS case came on for the second time for the purpose of determining the question as to the effect of a Scotch sequestration upon a gift of an annuity with a defeasance in the event of bankruptcy.

Mrs. *Graham*, having a power of appointment over certain trust property, subject to the life-interest therein of her mother Mrs. *Payne*, by her will, dated the 16th of February, 1863, made in execution of her testamentary power of appointment, appointed the property upon trust (after payment of debts and certain legacies) to pay out of the income of the remainder of the trust property, and if insufficient, out of the capital, to her husband, the Defendant *Henry C. T. Graham*, an annuity of £100 (increased by codicil in 1864 to £150), during his life, but with a declaration that if he should become bankrupt, or should assign, charge, or incumber, or suffer any act whereby the same or any part thereof would, if belonging absolutely to him, become vested in any other person or persons, then and in such case the said annuity should not be payable, or should cease to be payable, as the case might

require, in the same manner as if her said husband were dead; with a further direction that it should be lawful for the trustees, in their discretion, and without assigning any reason for so doing, at any time to refuse or discontinue payment of the annuity to her husband during the whole or any portion of his life. After satisfying the above purposes, the trustees were to hold the remainder of the trust property upon trust as Mrs. *Trappes* (a sister of the testatrix) should by deed or will appoint, and in default of and subject to any such appointment as last aforesaid, for the use and benefit of the children of Mrs. *Trappes* equally.

Mrs. *Graham* died on the 21st of June, 1864. On the 1st of April, 1868, Mrs. *Payne*, the tenant for life of the trust property, died.

On the 7th of May, 1861, *H. C. T. Graham*, who was then resident in *Scotland*, was upon his own petition duly adjudged bankrupt, under a sequestration according to Scotch law, and Mr. *Balgarnie* was elected and declared the trustee under the sequestration. On the 29th of August, 1868, *H. C. T. Graham* obtained his discharge under the sequestration; but it was alleged by the amended bill that such discharge was obtained without the consent of, and without making any composition with or for, his creditors who were still unpaid; and further, that such discharge was void, by reason of *H. C. T. Graham* not having notified or disclosed to the trustee or the Court the existence of Mrs. *Graham's* will, or the benefits thereby given to or intended for him.

Mr. *Balgarnie*, the trustee under the Scotch sequestration, was on the 10th of February, 1869, discharged from his office of trustee.

On the 16th of January, 1868, *H. C. T. Graham* was adjudged bankrupt in this country upon his own petition, and a creditors' assignee was appointed.

On the 21st of July, 1868, an order was made by the Court of Bankruptcy upon the bankrupt's own petition, with the consent of the creditors, annulling the adjudication in bankruptcy. At the hearing of the suit (which was instituted for the purpose of administering the trust property), in December last, the Vice-Chancellor held that as the bankruptcy was annulled before the first payment to *Graham* under the annuity fell due, the clause of forfeiture did not operate (1).

(1) Law Rep. 9 Eq. 229.

V.-C. J. 1870 TRAPPES v. MEREDITH. (No. 2.)

With respect to the Scotch sequestration, which had been alleged by one of the answers and in the affidavits, leave was given to amend the bill by stating the Scotch sequestration and the proceedings taken under it.

The case now came on for hearing upon the question raised by the amended bill.

The opinions of Scotch advocates of eminence had been given on either side as to the effect of the Scotch proceedings in bankruptcy against *H. C. T. Graham*, and his discharge under the sequestration in August, 1868.

On the one side, the present Solicitor-General for *Scotland* (Mr. *A. R. Clark*, Q.C.) and another Scotch advocate had (on the assumption that the gift of the annuity was absolute, and contained no clause of defeasance) given their opinion that the discharge of *H. C. T. Graham* on the 29th of August, 1868, even if valid, did not prevent the annuity from falling under the sequestration and vesting in the trustee, the discharge having been subsequent in date to the opening of Mr. *Graham's* right to the annuity, that the annuity was still bound by the sequestration, and that a discharge without composition did not reinvest the bankrupt in his estate. In their opinion Mr. *Graham's* discharge was not void, but voidable on account of his having failed to notify to the trustee the acquisition of the legacy or the annuity: 19 & 20 Vict. c. 79 (*Bankruptcy, Scotland*), s. 103.

On the other hand, an affidavit had been made on behalf of the Defendant *Graham*, by Mr. *E. S. Gordon*, Q.C., Dean of the Faculty of Advocates, to the following effect:—

Assuming it to be true that *H. C. T. Graham* was duly adjudged bankrupt in *Scotland*, under a sequestration according to Scotch law, on the 7th of May, 1861, and obtained his discharge under the sequestration on the 29th of August, 1868, and that *Balgarnie*, the trustee appointed under the sequestration, was on the 10th of February, 1869, discharged from his office of trustee, any property or moneys acquired by *Graham*, or to which he became entitled since the 29th of August, 1868, would, according to Scotch law, be subject to his absolute personal control, free from any claim on behalf of or liability to any of his creditors; nor after the 10th of February, 1869, would *Balgarnie* or any other person be

entitled to prosecute any claim or demand in respect of any property which might have formed part of the bankrupt's estate previously to his discharge.

According to Scotch law, the discharge of a bankrupt, even if obtained by fraudulent concealment, would not be absolutely void; and until actually avoided by means of a formal order of the Court, made after the fraud had been duly proved, every such order would be effective and binding.

Mr. *Gordon* was also of opinion that the mere omission to disclose a fact relating to a bankrupt's affairs of no practical importance to the creditors of the bankrupt, and from which they could not derive any benefit, would not render an order of discharge voidable; and, further, that where a trustee under a Scotch sequestration had been discharged from his office after the discharge of the bankrupt, a new trustee would not be appointed unless such appointment appeared likely to be for the benefit of the creditors claiming under the bankruptcy.

Evidence was also given as to the knowledge by Mrs. *Graham* of the proceedings under the Scotch sequestration.

Mr. *Willcock*, Q.C., and Mr. *Townsend*, for the Plaintiffs.

Mr. *De Gex*, Q.C., and Mr. *C. Pontifex*, for persons interested in remainder.

Mr. *Kay*, Q.C., and Mr. *Bradford*, for the Defendant *Graham*.

Mr. *Bristowe*, Q.C., and Mr. *C. C. Barber*, for the trustees, who (considering that the primary intention of the testatrix was to benefit her husband) were willing to pay him the annuity if they could safely do so.

The arguments, with the additional element of the knowledge by the testatrix, when she made her will, of the Scotch bankruptcy of her husband, which had already happened, were similar to those used on the former occasion.

The following authorities were referred to:—*Manning* v. *Chambers* (1); *Twopeny* v. *Peyton* (2); *Seymour* v. *Lucas* (3); *Young-*

(1) 1 De G. & Sm. 282. (2) 10 Sim. 487.
(3) 1 Dr. & Sm. 177.

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husband v. *Gisborne* (1); *Rochford* v. *Hackman* (2); *White* v. *Chitty* (3); *Lloyd* v. *Lloyd* (4); *Dorsett* v. *Dorsett* (5); *Davidson's* Conveyancing (6); 19 & 20 Vict. c. 79 (*Scotch Bankruptcy*), s. 103.

June 27. SIR W. M. JAMES, V.C.:—

This case was heard before me some time ago, and, as heard upon the materials before me then, is reported (7). On that occasion I came to the conclusion that an English bankruptcy, which had been superseded, did not operate as a forfeiture of the annuity under the peculiar terms by which that annuity was given to the husband by the will of the wife who was the testatrix in the cause. But in the course of the proceedings it came out that there had been a previous Scotch sequestration, and I desired the bill to be amended, and evidence to be gone into so as to shew exactly the state of the Scotch sequestration and the rights under it. It appears that in 1861, that is to say, two years before the will of the testatrix, the husband, *H. C. T. Graham*, was adjudged a bankrupt in a sequestration according to the Scotch law, the effect of which would be to vest in the trustees any estate whatever which might come to him before he should obtain his full discharge under the sequestration.

The discharge was obtained by Mr. *Graham* on the 29th of August, 1868, but was not such a discharge as to divest anything that had vested in the assignees, or to revest it in him. The discharge would not have the operation that an annulment of the English adjudication would have. It appears however that the wife, who was living with the husband, was, in fact, a party to the proceedings under which the sequestration was obtained. She appears to have furnished the means of obtaining the necessary legal proceedings, and to have actually bought part of the assets under it; so that when she made her will it is impossible to doubt that she was fully and perfectly aware of the existence of that Scotch bankruptcy, and must, I think, be taken to have known the legal effect of it.

(1) 1 Coll. 400.
(2) 9 Hare, 475.
(3) Law Rep. 1 Eq. 372.
(4) Law Rep. 2 Eq. 722.
(5) 30 Beav. 256.
(6) Vol. iii. pp. 86 *et seq.*
(7) Law Rep. 9 Eq. 229.

I have now to consider the will with reference to that knowledge which we must impute to the wife; and I am of opinion that when she made this bequest in favour of her husband, with the declaration that if he became bankrupt, or should assign, charge, or incumber, or so on, the annuity should cease as if he were dead, it is impossible to attribute to her the intention that the Scotch sequestration should be a bankruptcy within the meaning of that clause. It would be perfectly idle, it seems to me, to have made these provisions for the husband determinable by an event which she herself knew had occurred already. Then, on the other hand, it seems to me to be equally absurd to suppose that she intended to give this to the assignees under the Scotch bankruptcy. These are two intentions, either of which, as it appears to me, it is too unreasonable to impute to the testatrix. Then we have to consider the will, and to see what provision she has made, whether she has enabled the Court to give any reasonable operation to that provision; and it appears to me that the will does afford sufficient indication of her intention in the clause by which she has provided that it "shall be lawful for her said trustees or trustee, or either of them, if they or he should in their or his absolute discretion think fit, and without assigning any reason for so doing, at any time or times to refuse or discontinue the payment of the annuity to her husband during the whole or any period of his life." It appears to me that that provision exactly meets the case of the Scotch sequestration—that she must be taken to be aware that her husband could take nothing under the will without the assent of the trustees under the Scotch bankruptcy. At the same time she did not mean them to have it, and therefore she has enabled her husband to go to the Scotch trustees and say, "Now you see the position in which I am placed. You cannot take it, the trustees will not pay it to you, and it is not probable that they will pay it to me. If you do not let me have it, it must go over to those in remainder, so you had better come to terms with me." I believe she intended that he should have the means of going and making terms with those Scotch trustees, by which he would be able to resume his right to the personal receipt of the annuity. Therefore, I propose to declare that the Scotch bankruptcy is not a bankruptcy within the meaning of the clause

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of forfeiture in the will, but that the annuity is subject to the absolute discretion of the trustees as to whether they shall or shall not pay it. With respect to the instalments of the annuity, the times for payment of which have already accrued, the trustees are bound within some reasonable time to be fixed (the last day of Michaelmas Term, 1870), to declare whether or not they intend to refuse to pay them, and they are bound, within a reasonable time after each instalment of the annuity shall become payable, to make a similar declaration.

Solicitors: Mr. *V. Southee;* Messrs. *Rooks, Kenrick, & Harston;* Messrs. *Meredith & Co.*

V.-C. J. 1870 *June* 30.

RUDD *v.* ROWE.

Practice—Staying Proceedings—Costs.

When the Defendant offers to comply with Plaintiff's demand, and would have done so, if asked, before bill filed, the Court will stay all further proceedings without costs.

MOTION on behalf of Defendants to stay all further proceedings in the suit.

Thomas Stevenson, by will, bequeathed to Plaintiff an annuity of £30 per annum, to be paid to her quarterly, or otherwise, as she should desire, and directed his executors to set apart any part of his real or personal estate they might think fit to answer the annuity.

The Plaintiff also claimed to be a creditor of the testator for £8 15*s.* The Defendants, the executors, had paid her the sum of £4 12*s.* 6*d.*, in part payment, as she alleged, of the debt, but, as the Defendants alleged, in respect of her annuity. In answer to inquiries by Plaintiff's solicitor, Defendants' solicitors wrote stating that £1000 stock had been appropriated to answer the annuity, and that the £4 12*s.* 6*d.* already paid had been paid on account of the annuity, and declining to pay the debt until it was proved.

Under these circumstances Plaintiff filed her bill for administration of the estate, for payment of the balance of £4 2*s.* 6*d.* due to

her, and for payment of a gross sum sufficient to purchase an annuity of £30 a year.

The Defendants now moved for an inquiry to ascertain the value of the annuity and the amount of the debt, and that on payment thereof all further proceedings in the suit should be stayed; without costs.

Mr. *Kay*, Q.C., and Mr. *Jason Smith*, in support of the motion, referred to *Wallis* v. *Wallis* (1), where Vice-Chancellor *Kindersley* observes, "Now, there are cases in which an application may be made by Defendant to stay proceedings without costs. Suppose a party, without any dispute having been raised by the Defendant, files a bill. Then the Defendant may well say, 'I never disputed your right. Why did you not apply to me before you filed a bill? You have filed a bill merely to make costs.' In such a case, the Court, without going into the merits, would stop the suit without costs, on the ground, extrinsic to the merits, that the Plaintiff ought never to have filed a bill at all."

Mr. *W. H. Terrell*, for the Plaintiff:—

The rule is well settled, that where a Defendant applies to stay proceedings on submitting to Plaintiff's demand, he must pay Plaintiff's costs: *Daniell's* Chancery Practice (2). The passage cited from *Wallis* v. *Wallis* was a mere *dictum*, not acted upon in that case, nor since followed.

Sir W. M. James, V.C.:—

Finding what Vice-Chancellor *Kindersley* has laid down in *Wallis* v. *Wallis*, as to staying proceedings without costs, I am glad to avail myself of that authority. If the cause had gone on to a hearing, I should have made the Plaintiff pay all the costs. The executors have already set apart £1000 for the purpose of answering the annuity, and the bill is reduced to a demand for £4 2*s.* 6*d.*, which the Defendants are willing to pay. I think it right to prevent suits being instituted for the mere purpose of making costs, and upon the undertaking by the Defendants to pay the £4 2*s.* 6*d.*, I stay all further proceedings without costs.

Solicitors: Mr. *Pope*; Messrs. *Farmer & Robins*.

(1) 4 Drew, 458, 463. (2) 4th Ed. p. 735.

V.-C. J.
1870
July 2.

In re FLEMON'S TRUSTS.

Lands Clauses Act —Purchase-money—Interim Investment on Real Security—Costs.

18 Eq 278

Upon an order for an interim investment on real security of purchase-money paid into Court under the *Lands Clauses Act*:—

Held, that the costs of the interim investment must be paid by the company, but not the costs of any subsequent investment in land.

THIS was a Petition by a tenant for life and the trustees of a marriage settlement, for an interim investment on real securities, under the 70th section of the *Lands Clauses Act*, of a sum of money which had been paid into Court by the *Metropolitan District Railway Company*, in respect of land included in the settlement, and compulsorily taken for their works. There had been a prior investment in reduced annuities, the costs of which had been paid by the railway company.

Mr. *C. J. Hill*, for the Petitioners, referred to *In re Smith's Estate* (1); also to *In re Lomax* (2).

Mr. *Bovill*, for the railway company, asked that this might be considered as a permanent investment in regard to future costs.

SIR W. M. JAMES, V.C.:—

According to the cases cited, I have power to order a temporary investment on real security.

The company must pay the costs of this investment, but are not to be compelled to pay the costs of any subsequent investment in land. There must be the usual references as to title and as to the eligibility of the proposed investment.

Solicitors for the Petitioners: Messrs. *Tathams, Curling, & Walls.*
Solicitors for the Railway Company: Messrs. *Burchells.*

(1) Law Rep. 9 Eq. 178. (2) 34 Beav. 294.

In re BRAMPTON AND LONGTOWN RAILWAY. COMPANY.

V.-C. B.
1870
July 7.

Railways Abandonment Act, 1869 (32 & 33 *Vict. c.* 114), *s.* 5—*Application of Deposit or Bond—Promotion of Company—Preliminary Expenses.*

Upon the construction of sect. 5 of the *Railways Abandonment Act*, 1869, claims in respect of expenses incurred by Parliamentary agents in getting the bill of a projected railway company passed through Parliament, and for moneys advanced by the intending contractor for the same purpose, are debts which have been incurred on account of the promotion of the company; and the Court, under the discretion given by that section, will not hold it reasonable, as between such creditors and the surety to the bond, that their debts should be paid out of the bond, which, by the warrant for the abandonment of the railway, has been directed to be applied as part of the assets of the company.

THIS case involved the construction of sect. 5 of the *Abandonment of Railways Act*, 1869 (32 & 33 Vict. c. 114), and came before the Court upon motion on behalf of *Albert Ricardo*, the Petitioner for the winding up of the *Brampton and Longtown Railway Company*, that the money secured by a bond, dated the 11th of December, 1866, for £17,400, under the common seal of the company, and under the hand and seal of *Ricardo* as surety, pursuant to sect. 27 of the *Brampton and Longtown Railway Act*, 1866 (29 & 30 Vict. c. cccxlix.), should not be applicable to the payment of certain debts and claims alleged to have been incurred on account of the promotion of the company.

It appeared that the *Brampton and Longtown Railway* was first projected in 1863, and in the course of that year a civil engineer in *Scotland* named *Bouch* introduced the scheme to Mr. *Dodds*, of the firm of *Dodds & Hendry*, Parliamentary agents, to enable them to secure the Parliamentary agency of the undertaking.

Nothing material was done until 1865, when *Dodds & Hendry* opened communications with Messrs. *Carrick & Lee*, solicitors at *Brampton;* and in the course of the correspondence *Dodds & Hendry* suggested the names of some of the resident gentry who were to be applied to to act as directors, and that such directors would probably require a guarantee against expenses "which we (*Dodds & Hendry*) shall be prepared to give them."

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The bill was introduced into Parliament, and in July, 1866, *Dodds & Hendry* wrote to *Shaw & McNimmo*, then acting as solicitors in passing the bill through Parliament, offering to take so much of their account as consisted of professional charges, distinct from outlay, in shares of the company.

The Act received the royal assent in August, 1866, and in July, 1867, *Dodds & Hendry* sent in their bill of costs of procuring the Act.

With respect to one of the claims, which was on behalf of Messrs. *Boulton & Jones*, railway contractors, it appeared that in December, 1865, after the bill had been introduced into Parliament, *Boulton* had various conferences with the solicitor and Parliamentary agents. Negotiations took place as to the terms upon which the firm would enter into a contract for construction of the line, and it was arranged that *Boulton & Jones* should take a portion of the contract price in paid-up shares, and would advance money towards the expenses of carrying the bill through Parliament (including moneys for interest on the Parliamentary deposit, fees to the Houses of Parliament, and advertisements, &c.), not exceeding in all £1000.

It was admitted by *Boulton*, on cross-examination, that it was understood that if the bill should not pass he should have no claim against the engineers, promoters, or solicitors personally, and that in such a case he should have looked upon the £1000 expended as lost money.

The moneys advanced by *Boulton & Jones* amounted to £664, and they signed the subscription contract to the extent of £25,000. In June, 1866, before the bill received the royal assent, the question of replacing the Parliamentary deposit was raised, as the banker, who was one of the promoters, and had found the deposit-money, declined to remain security any longer. *Boulton* was requested to replace the deposit, but he refused. In the result, and in order to prevent the sacrifice of the moneys already advanced, it was arranged that, upon another contractor being found, *Boulton & Jones* should retire from the contract upon having the moneys expended by them, with a small premium, repaid by the company with interest within six months after the bill received the royal assent. The negotiations resulted in the contract being

taken by Mr. *Chambers*, and in Mr. *Ricardo* agreeing to give the bond to the Treasury. Accordingly, after the passing of the Act (which received the royal assent in August, 1866), *Ricardo*, upon the 14th of December, 1866, executed as a surety the bond of the company to the Treasury for £17,400, and upon the bond being given the deposit mentioned in sect. 27 of the special Act was released (1).

(1) Sect. 27 of the *Brampton and Longtown Railway Act*, 1866, was (so far as is material) as follows:— "Whereas, pursuant to the Standing Orders of both Houses of Parliament, and to an Act, 9 Vict. c. 20, £8700, being 8 per cent. on £107,515 0*s.* 11*d.*, the amount of the estimate of the expense of the railway by this Act authorized, has been deposited in the names of *E. Waugh* and *T. Graham* (being subscribers to the undertaking) with the Court of Chancery in respect of the application to Parliament for this Act: Therefore, notwithstanding anything contained in the said recited Act, the said sum so deposited, or the interest or dividends thereof, shall not, except upon the execution of such bond as hereinafter mentioned, be paid or transferred to, or on the application of, the person or persons, or the majority of the persons, named in the warrant or order issued in pursuance of the said Act, or the survivors or survivor of them, unless the company shall previously to the expiration of the period limited by this Act for the completion of the railway either open the railway, or prove to the satisfaction of the Board of Trade that the company have paid up one-half of the amount of the capital by that Act authorized to be raised by means of shares, and have expended for the purposes of this Act a sum equal in amount to such one-half of the said capital. And if the said period shall expire before the company shall either have opened the railway, or have given such proof as aforesaid, the sum so deposited, and the interest and dividends thereof, shall immediately from and after the expiration of the said period be forfeited to Her Majesty, and be paid by the officer or person in whose name they shall then be deposited or invested to the account of Her Majesty's Exchequer, and when so paid and transferred shall be carried to and form part of the Consolidated Fund of the *United Kingdom*: Provided, that at any time after the passing of this Act, if a bond in twice the amount of the sum so deposited shall have been executed by the company with one or more surety or sureties (such bond to be prepared to the satisfaction of, and such surety or sureties to be approved by, the solicitor to the Lords Commissioners of Her Majesty's Treasury), conditioned for payment to Her Majesty, her heirs or successors, of the sum so deposited if the company shall not within the time limited for the completion of the railway either open the railway for the public conveyance of passengers, or prove to the satisfaction of the Lords of the said Committee [Board of Trade], that the company have paid up one-half of the amount of the capital by this Act authorized to be raised by means of shares, and have expended for the purposes of this Act a sum equal in amount to such one-half of the said capital; and if such bond shall have been deposited with the solicitor to the said Lords Commissioners, then such

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On the 7th of April, 1869, in pursuance of the *Abandonment of Railways Act*, 1850, and the *Railway Companies Act*, 1867, *Ricardo* applied to the Board of Trade for authority to abandon the railway, and on the 12th of October, 1869, a warrant was granted for the abandonment of the railway and undertaking, upon the usual condition that the money secured by the bond conditioned for the completion of the railway, or for payment of money in default thereof, should be applied as part of the assets of the company: *Railway Companies Act*, 1867, s. 31, cl. 3.

Ricardo thereupon obtained upon petition an order to wind up the company (*Abandonment of Railways Act*, 1869, s. 4), and now moved in the terms above stated.

The 5th section of the *Abandonment of Railways Act*, 1869 (32 & 33 Vict. c. 114, s. 5), upon which the question turned, was as follows :—

"If the warrant for the abandonment was made on condition that the money deposited as security for the completion of the railway, or the stocks, funds, or securities in which the same is invested, or the money secured by any bond conditioned for the completion of the railway, or for payment of money in default thereof, should be applied as part of the assets of the company, the Court may, if it think fit, direct that such money, stocks, funds, and securities shall not be applicable for the payment of any debt, or part of a debt, which, regard being had to what is fair and reasonable as between all the parties interested under all the circumstances of the case, appears to the Court to have been in-

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sum of money and the interest or dividends thereof shall be paid to or on the application of the person or persons, or the majority of the persons, named in such warrant or order as aforesaid, or the survivor or survivors of them, and it shall not be necessary to produce any certificate of this Act having passed, anything in the said recited Act to the contrary notwithstanding; and the moneys to be recovered upon such bond shall be dealt with in like manner as the said sum of money and the interest or dividends thereof would have been dealt with under this Act if such bond had not been executed and deposited as aforesaid; and the certificate of the said solicitor to the said Lords Commissioners that such bond has been executed and deposited as aforesaid, and the certificate of the Lords of the said Committee that such proof has been given to their satisfaction as aforesaid, shall respectively be sufficient evidence of the facts so certified."

curred on account of the promotion of the company. Any person who provided such money, or any part thereof, or who entered into such bond, may, subject to any directions or rules of the Court, attend all proceedings under this section, and other proceedings in the winding-up, and apply to the Court to act under this section."

Sections 19 & 29 of the *Abandonment of Railways Act*, 1850 (13 & 14 Vict. c. 83), and sect. 31 of the *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127), were also referred to as material in the course of the argument.

Messrs. *Shaw*, *Nimmo*, and *McKay* (the solicitors and engineers engaged in promoting the bill), having expressed their willingness to look to the general assets of the company, other than the bond, for payment of their claims, the question was limited to the claims on behalf of *Dodds & Hendry*, and *Boulton & Jones*, to have their debts paid out of the money secured by the bond.

Mr. *Fry*, Q.C., and Mr, *Westlake*, in support of the motion:—

The Court must put a construction upon the words "Debts incurred on account of promotion," in sect. 5 of the *Abandonment of Railways Act*, 1869; and we submit that the debts of *Dodds & Hendry*, and of *Boulton & Jones*, were strictly debts incurred on account of promotion of the company, and as such must be disallowed. The true criterion will be, whether the debt, or the substantial part of it, was incurred before or after the passing of the special Act; and we contend that everything that has been incurred up to the formation and incorporation of the company by Act of Parliament, is a debt incurred on account of promotion. Throughout the Standing Orders, the word "promoters" always means the persons who solicit an Act. And again, sect. 16 of the *Abandonment of Railways Act*, 1850 (13 & 14 Vict. c. 83), provides that in considering the expediency of authorizing the abandonment of a railway, the Board of Trade shall have regard to the local circumstances of the objecting shareholders; "and in the case of any such shareholders being original subscribers in the undertaking, and not being solicitors, agents, or engineers employed in promoting the same," may make certain provisions. By the *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127), s. 31, the deposit or bond, which was before applicable only for completion

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of the line, is made assets of the company for payment of its debts. But the debts in question were contracted before the passing of that Act, at a time when the parties now claiming could have looked to the subscribed capital only, and not to the bond. Sect. 5 of the Act of 1869 was then inserted, at the express instance of the Board of Trade, to remedy the evils that arise from the assets of the company (of which the bond was a portion) being applicable to the payment of the creditors (including the solicitors, engineers, and Parliamentary agents), and then of the shareholders, to the exclusion of the surety, who, being a mere surety, neither creditor nor shareholder, could acquire no part of the assets, although he had been induced to enter into the bond for the convenience of the solicitors and agents, who were themselves in most cases shareholders. Messrs. *Dodds & Hendry* may be said to have been merely agents for the purpose of procuring the special Act, but they were agents without a principal, their only principal being the company, which was not then in existence. They were principals in an enterprise to promote the company, and of all the promoters *Dodds* was the most active, and the origin and source of the undertaking. In the case of *Boulton & Jones*, if they were not prime movers in the scheme, they advanced their money for the purpose of g tting the Act passed; and their debt, equally with that of *Dodds & Hendry*, has been incurred on account of the promotion of the company; and under sect. 5, the Court will direct that the moneys secured by the bond are not applicable for their payment.

Mr. *Greenside*, in support of Messrs. *Dodds & Hendry's* claim :—

This is a most unreasonable application, and does not come within the meaning of sect. 5 of the Act of 1869, which is vague and indefinite in its terms, and cannot override the precise language of sect. 47 of the *Brampton and Longtown Railway Act*: "All costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the company."

A Parliamentary agent or solicitor engaged in passing a bill through Parliament is in no sense a promoter. He merely acts as the agent of the promoters. He would not in the earlier days of

railways have signed the subscription contract. He would not be liable for expenses incurred in promoting the company, nor would he be sued upon a contract entered into by the promoters. Messrs. *Dodds & Hendry*, by getting the Act passed, have enabled Ricardo to get his bond released, subject to payment of the *bonâ fide* debts of the company. Their debts are *bonâ fide*, and in respect of moneys expended and services rendered, and ought to be paid out of the assets of the company, of which this bond forms part. The real promoters in this case were evidently Messrs. *Boulton & Jones*, who advanced the sums necessary for proceeding with the Act.

[He referred to *Earl of Shrewsbury* v. *North Staffordshire Railway Company* (1); *Companies Clauses Consolidation Act*, 1845 (8 Vict. c. 16), s. 65.]

Mr. *Macnaghten*, in support of the claim of Messrs. *Boulton & Jones*:—

The power given by sect. 5 is discretionary and not obligatory, and the Court will be cautious in exercising its discretion so as to disappoint the just claims of creditors of the company. Messrs. *Boulton & Jones* were not in any sense promoters, as before they had anything to do with the company all preliminary steps had been taken, and the bill was actually lodged in Parliament. The money was not advanced by *Boulton* for any purpose struck at by sect. 5, but for the purpose of his contract only; and when he was required to find the bond for the purpose of releasing the Parliamentary deposit, he retired from his position of contractor. No hard-and-fast line can be drawn at the time of the passing of the Act in determining the meaning of the word "promotion," especially as the section directs that the Court is "to have regard to what is fair and reasonable between all the parties under all the circumstances of the case." The real promoters in this case would seem to have been *Dodds & Hendry*, who had no person behind them to whom they could look for payment.

Mr. *Eddis*, Q.C., for the official liquidator.

Mr. *Fry*, in reply.

(1) Law Rep. 1 Eq. 593.

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MR. BACON, V.C.:—

This is said to be a new application, and probably it is so; but I cannot say that, in my judgment, it creates much difficulty. The whole question turns upon sect. 5 of the *Railways Abandonment Act*, 1869, and although the phraseology of that section is more familiar than, and a little different from, that in which Acts of Parliament used formerly to be expressed, it is perfectly plain. It would be impossible almost to misconstrue the words of this Act of Parliament. The deposit having been made for the convenience of the company, it was afterwards released, and the bond substituted; and upon the application to abandon the railway, the Board of Trade imposed that condition which by law they are entitled to impose, that the money secured by the bond should be assets of the company. Then comes this Act of Parliament dealing with that subject—namely, the bond to which the Board of Trade have annexed the condition—which provides that if the warrant for the abandonment was made upon condition that the money secured by any bond for the completion of the railway, or for payment in default thereof, should be applied as part of the assets of the company, "the Court may, if it thinks fit, direct that such moneys, stocks, funds, and securities shall not be applicable to the payment of any debt, or part of a debt, which, regard being had to what is fair and reasonable as between all the parties interested under the circumstances of the case, appears to the Court to have been incurred on account of the promotion of the company." To approach the question, therefore, the first point to be settled must be whether the debts which are now claimed on behalf of *Dodds & Hendry* or *Boulton & Jones* are debts on account of the promotion of the company. As a matter of fact, can there be any doubt about that? Parliamentary agents, who it appears had no clients but the company, not then existing, the company in prospect, as the correspondence shews, were active and energetic promoters of the company. Every shilling of expense which has been incurred by these Parliamentary agents has been incurred on account of the promotion of the company, and for no other purpose in the world. As to Mr. *Boulton*, the contractor, his own statement puts it also beyond question. As a matter of fact, after certain proceedings had been taken towards the promotion of the company, the contract is

4 L. R. 320

offered and accepted by him on certain terms. One of the terms is, that he shall advance the money necessary to pass the bill through the House of Commons and the House of Lords—to get the bill passed, in short; and for that purpose, and to promote the company, he lays out the money—wisely or not is not now the question. He says if the bill did not pass he was to have no claim, which, in my opinion, does not alter the case at all upon the question of promotion. The advance made by him was for the promotion of the company. If I arrive at that, and satisfy myself, as I do, that the two debts claimed are debts which have been incurred on account of the promotion of the company, I have then to consider that part of the sentence which is parenthetical—"regard being had to what is fair and reasonable as between all the parties interested under all the circumstances of the case." Now, what is fair and reasonable? Mr. *Ricardo*, for no particular interest or motive of his own, enables the sum which had been deposited to be released, and he enters into that security. Is it fair and reasonable, as between him and the promoters, the persons who made these advances, with whom these debts had been incurred, that they shall call upon him to pay? Is there anything like fairness or reasonableness in that? They could not have contemplated, at the time they incurred the expenses and became entitled to the debts they claim, assuming that they are entitled to them, that Mr. *Ricardo* should be their paymaster; or that any sum which he had undertaken to pay in case the railway should fail, or in any other event for security against which the bond is given, should in any of these events be liable for the claims of these gentlemen, who for their own interests and their own objects, in the hope of gain to themselves, had advanced their money and expended their services in the promotion of the company. It is perfectly plain, and I should not have troubled Mr. *Fry* to reply, but that I was told this was the first application of the sort, and therefore I wished to hear everything that could be said upon the subject.

I declined to accept the invitation which Mr. *Westlake* threw out to me, to lay down some rule, or to draw some line. I do not think it is in the least degree necessary, and it is at all times dangerous. But upon the very plain words of the Act of Parlia-

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ment, and the very plain and undisputed facts of the case, I think the application made on behalf of Mr. *Ricardo* is a perfectly reasonable one, and that there should be no distinction made between the money which Parliamentary agents have laid out by way of disbursements, and those charges which they make as remuneration for their services; because the money they spent, and the services they rendered, were all for the same object—namely, the promotion of the company.

The Court directed that the money secured by the bond should not be applied in payment of the debts of Messrs. *Dodds & Hendry* and *Boulton & Jones*. The official liquidator to have his costs out of the assets of the company. No further order as to costs.

Solicitors: Messrs. *Ashurst, Morris, & Co.*; Mr. *Durnford*; Messrs. *Young, Maples, & Co.*; Messrs. *Flux & Leadbitter*.

V.-C. B. 1870 *July* 8.

In re BANK OF LONDON ASSURANCE ASSOCIATION.

PART'S CASE.

Assurance Association — Unregistered Company — Transfer — Winding-up — Association not dissolved—Absence of Novation—Liability of Association—Shareholders to contribute.

18 Ch. D. 530

The deed of settlement of an insurance association, dated in 1856, contained clauses empowering the directors, with the sanction of general meetings, to purchase shares on behalf of the association; to dissolve the association; and to transfer the business to any other insurance company.

The association was never registered; and, in 1858, it was resolved that the business should be transferred to the *A.* company; each proprietor in the association to have the option, either of being repaid in money the amount he had paid upon his association shares, or to have *A.* company shares allotted to him in lieu of his association shares.

The transfer having been effected by deed, and the *A.* company and the association being both afterwards in liquidation:—

Held, that a shareholder in the association, who had for some of his association shares received *A.* company shares, and for others cash, was liable to be retained on the list of contributories of the association.

Adjourned Summons.

The deed of settlement of the *Bank of London and National*

Provincial Assurance Association, dated the 21st of August, 1856, contained the following clauses:—

Clause 65. "That the board of directors shall, if authorized by the resolution of a general meeting, as hereinbefore provided, but not otherwise, be at liberty to purchase on behalf of the association any shares therein, at such price as the board of directors shall deem fair and reasonable; and upon completion of any such purchase, to cause a proper entry to be made in the register of shareholders of the association, to shew that the seller of such shares has ceased to continue a proprietor thereof, and that the same have been purchased for and for the benefit of the association; and all dividends and profits which might otherwise accrue in respect of such shares prior to the same being afterwards disposed of for the benefit of the association, as hereinafter provided, shall, unless the board of directors shall otherwise determine, be absolutely extinguished for the benefit of the association, and no claim shall arise or be made against the association in respect thereof; and all the rights whatever incidental to such shares shall remain in suspense and abeyance until the same shall be sold for the benefit of the association, as hereinafter provided."

Clause 109. "That if, at any extraordinary general meeting of the association for that purpose convened, a majority, consisting of at least two-thirds in number of the shareholders present thereat, holding among them two-thirds at least of the shares in the association for the time being subscribed for, shall so resolve; and such resolution shall, within two calendar months, but not sooner than twenty-one days thereafter, at another extraordinary general meeting for that purpose convened, be confirmed by a like majority, then the association shall, as from the date of such last-mentioned confirmation, but subject to the provisions of the next succeeding paragraph, be dissolved."

Clause 110. "That when such dissolution shall have been so resolved on, and subject to any special directions to be given in relation thereto by such general meetings, the directors shall, with all convenient speed, call in, convert into money, and realize, as they shall think best, all the estate and effects of the association not consisting of money; and a general account and valuation of the said estate and effects, and of the proceeds of the conversion

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thereof, shall be made and submitted to an extraordinary general meeting to be held for the purpose, and when approved of by such meeting shall be binding upon the shareholders; and upon the settlement thereof, the surplus estate and effects (if any) of the association shall, after payment of all just demands upon the association, be divided amongst the shareholders in proportion to their respective shares. . . . Provided always, that notwithstanding the passing of such resolution as aforesaid for the dissolution of the association, these presents, and all rights and liabilities thereunder, shall, until the affairs of the association shall have been wound up, and the assets thereof completely realized and divided as aforesaid, continue in full force and effect, for the purpose last aforesaid."

Clause 111. "That an existing board of directors, specially convened for that purpose, shall have power to consider and determine upon the expediency of a sale or transfer of the business and undertaking of the association to any other insurance company, and also the expediency of purchasing and transferring to or merging in the said association the business and undertaking of any other insurance company, and the terms and conditions on which such sale, transfer, or purchase respectively should be made; and if the resolutions come to at such board touching such sale, transfer, or purchase as aforesaid, shall be adopted and confirmed by a majority of at least two-thirds of the shareholders of the association present, personally or by proxy, at some extraordinary general meeting thereof to be for that purpose specially convened, such sale, transfer, or purchase, as the case may be, shall be completed and carried into effect accordingly."

The association was not incorporated or registered under any Act of Parliament.

In 1858 a proposal was made for the transfer of the business of the association to the *Albert Life Assurance Company*, and the board of directors of the association came to an agreement (subject to the approval and confirmation of a general meeting), that the association should sell, transfer, and dispose of all their business, property, rights, and liabilities to the company.

Accordingly, by a deed of agreement dated the 7th of October, 1858, and made between the directors of the *Bank of London*

Association of the one part, and the directors of the *Albert Company* of the other part, after reciting the above agreement, it was agreed between the parties that the business of the association should, on or from the 6th of September, 1858, be transferred and assigned to the company, and should thenceforward be carried on by the company, and that the association and its directors should on or from that day "cease to carry on such business except for the benefit of and in trust for the company" in manner thereinafter mentioned. It was also agreed that all the debts, engagements, liabilities, and risks of the association or its trustees, and all claims and demands against the association or its trustees, should be paid, performed, borne, undertaken, and met by the company; and that the company should indemnify the association and its trustees against all actions, suits, and proceedings, and all costs and charges.

It was further provided that, after the approval and confirmation of the agreement, each proprietor should be entitled, either to be paid in money, by three equal instalments, on the 1st of January, 1860, 1861, and 1862, the full amount of all sums which may have been paid up on his shares; or to have allotted to him, in lieu of all or any part of such amount, so many £20 shares in the company on which £3 should be credited as paid as would be equal in the aggregate to the sum in lieu of which he had accepted such shares—such option not to be exercised as to any fractional part of £3. Each proprietor was also entitled to be paid half-yearly interest, at the rate of £5 per cent. per annum, on the moneys to which he might be entitled for the time being outstanding, until the whole of the principal moneys and interest were fully paid up.

At a meeting of the shareholders of the association, held on the 20th of October, 1858, the agreement embodied in the above deed was duly confirmed.

At the date of the deed, *James Part* was the registered holder of 370 shares in the association, upon which £1 had been paid up; and on the 18th of May, 1859, 1000 further shares (£1 paid) were also registered in his name.

Mr. *Part* applied for, and on the 13th of February, 1860, had allotted and paid to him, 123 *Albert Company* shares (£3 paid), and £1 in cash, in lieu of 370 of the 1370 association shares.

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On the 9th of February, 1860, £333 6*s.* 8*d.*, being one-third of the amount paid up on 1000 of the shares held by him, was paid to him by the *Albert Company.*

On the 13th of February, 1860, Mr. *Part* transferred 750 of the 1000 shares to another person.

In January, 1861, £83 6*s.* 8*d.*, being another third, and in January, 1862, the like amount of £83 6*s.* 8*d.*, being the remaining third of the amount paid up on the 250 shares, was paid to Mr. *Part* by the *Albert Company.*

On the 17th of September, 1869, the *Albert Company* was ordered to be wound up; and on the 22nd of January last, a winding-up order was made against the association, on a petition presented by an unpaid annuitant, who had purchased an annuity from the association subsequently and subject to the deed of amalgamation of the 7th of October, 1858.

Mr. *Part's* case had been selected by the Chief Clerk as a representative case on which to take the opinion of the Court as to whether shareholders in his position ought or ought not to be placed on the list of contributories.

Mr. *Fry*, Q.C., and Mr. *Jackson*, for Mr. *Part*:—

Two things are necessarily involved in the fact of a winding-up order having been made: one, that the association has not been dissolved under the powers of the settlement, but is still subsisting; the other, that the deed of amalgamation of the 7th of October, 1858, is a valid instrument. Thus the question is reduced simply to one of construction. The effect of the deed of amalgamation is to divide the existing shareholders of the association into three classes of persons:—1. Those who accepted shares in the *Albert* in satisfaction and extinction (in pursuance of clause 65 of the deed of settlement) of their *Bank of London* shares; 2. Persons who accepted a cash-payment in lieu and extinction of such shares; and 3. Persons who did neither one thing nor the other, and consequently remained shareholders of the association. Mr. *Part* represents the first two classes of persons.

We contend that only those persons who constitute the third class ought to be on the register of the association. There were

two ways of getting free of the association—one by taking cash, the other by taking *Albert* shares. If a proprietor did neither one thing nor the other, he went on receiving interest, but, of course, also continuing to be a member of the association. Only persons in the latter position are now members.

Even if the deed were not valid under the 111th clause of the settlement, it would be good, under the 65th clause, as to the liability of shareholders. The association agreed to buy Mr. *Part's* shares, and Mr. *Part* agreed to sell them.

Mr. *Eddis*, Q.C., and Mr. *Rodwell*, for the official liquidator:—

This company is unregistered, so that it is a mere partnership; and the sole question is, whether Mr. *Part* and the persons whom he represents are contributories under the 200th section of the *Companies Act*, 1862.

We ask, what has Mr. *Part* done whereby he can escape contribution? The agreement was for a sale to the *Albert*, and one of the terms of the contract was an indemnity. But what is it that relieves the association shareholders from their liability under the old partnership? They agree to sell their shares for shares or money. But does that relieve them from liability in respect of creditors? The creditors were no parties to the agreement. No question of novation of contract arises here.

On the 7th of October, 1858, the association ceased to carry on business. Mr. *Part's* name was then on the register.

However valid the arrangement might be as between shareholders, it cannot affect creditors.

Even had the association carried out a dissolution under the 109th clause, by the 110th clause the rights of creditors are expressly preserved, supposing that they could have been affected, which is impossible.

Mr. *Fry*, in reply:—

We do not contend that the association acted under its dissolution clauses.

The question is, who are the continuing shareholders? It does not lie in the mouth of the official liquidator to say he is not bound by the transaction of October, 1858.

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More than eleven years have passed since the association ceased to carry on business; all creditors by simple contract have long since been barred; and the only possible creditors are policy-holders and annuitants. These, we say, are bound by the provisions of the deed of settlement, and by the transfer.

In *Carr's Case* (1), the deed which bound the policy-holder contained a power of dissolution, and thereupon the directors were to get from another company an undertaking to pay all future liabilities, and to transfer so much as they might think expedient of the assets to such other company, and it was held that the amount of the assets to be transferred was a matter with which the policy-holder had nothing to do.

In the *Times Company Case* (2) there was machinery for a dissolution, and Lord Justice *James* (then Vice-Chancellor) held (3), that every person who contracted with the society must be held to have had knowledge of the provision just as if it had been written into the policy itself.

MR. BACON, V.C.:—

I do not see how anything that has been done can affect the rights of the creditors. Of course it is not suggested that they were parties to the transfer; and why should they, in their absence and in their utter ignorance, be deprived of that right which they derived from the original contract? There has been no dissolution, and therefore the case at the Rolls, which has been referred to, does not apply. There has been no *novatio*, and therefore the second case that was mentioned does not apply. It reduces itself, therefore, to a case of the most ordinary principle.

Is it possible for a partnership firm, or any individual, in any manner in which he deals with his own interest, to prejudice the interests of others? I cannot see any ground for any such principle. I conceive that there may be a great deal to be said when persons come to prove debts in the winding-up of the *Bank of London*. A great many questions may arise as to the extent to which Mr. *Part* should be held liable from the time when he ceased to be a shareholder, or thought he ceased to be a shareholder. With

(1) 33 Beav. 542. (2) Law Rep. 5 Ch. 381.
(3) Law Rep. 5 Ch. 389, n.

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that I have nothing to do at present. The question at present is, whether his name ought to be upon the register; and I am compelled, however reluctantly, to say I think he must remain there; because to say the contrary would be to dissolve the contract into which he entered with the creditors, without any act done or knowledge professed by the creditors of the means whereby the contract was to be dissolved.

As this is a representative case, the costs of both parties, as between solicitor and client, will come out of the estate.

Solicitors for Mr. *Part*: Messrs. *Ashurst, Morris, & Co.*
Solicitors for the Official Liquidator: Messrs. *Paine & Layton.*

BUCK *v.* ROBSON.

V.-C. B. 1870 *July* 12.

*Administration—Legal and Equitable Assets—*3 & 4 *Will.* 4, *c.* 104*—Insufficient Estate—Call made in a Winding-up—Nature of Liability—Companies Act,* 1862, *s.* 75.

The liability of a contributory to pay calls made since a winding-up is a debt by specialty which binds the heirs of the contributory.

FURTHER CONSIDERATION.

The suit was instituted for an account of the dealings and transactions of a partnership formerly subsisting between *John Croudace* and *Matthew Benjamin Robson*, as timber merchants, at *Sunderland*. *M. B. Robson* died on the 27th of March, 1865, intestate, leaving the Defendants, his widow, *Frances Eliza Robson*, and his only son, *Charles John Robson*, an infant, his next of kin. On the 5th of April, 1865, *John Croudace* was adjudged a bankrupt, and the Plaintiffs, *Robert Buck* and *James Peacock*, were appointed creditors' assignees. On the 28th of November, 1865, administration to the estate of *M. B. Robson* was granted to the Defendant *Frances E. Robson*.

The bill (which was filed on the 22nd of December, 1865) prayed that an account might be taken of what was due to the Plaintiffs in respect of *John Croudace's* share of the capital and assets of the partnership, and for payment by the Defendant *Frances E. Robson* of what should be so found due to the Plaintiffs,

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and, if she should not admit assets, for administration of the estate of *M. B. Robson*, and the usual accounts and inquiries.

The Defendant, the widow, not admitting assets, accounts and inquiries were, on the 14th of July, 1866, directed, on motion for decree. In answer thereto, the Chief Clerk, by his certificate, dated in May last, found that a sum was due from the Plaintiffs on the partnership accounts, which, however, they were entitled to retain, in order to pay a further dividend to the partnership creditors, to pay whom the joint estate was largely insufficient.

He also found that the separate debts of *M. B. Robson* consisted of one specialty and several simple contract debts, amounting together to £2645 1*s.* 9*d.*

The specialty creditor was *William Turquand*, as official liquidator of the *London and Scottish Banking Company, Limited*, for calls on ten shares. The amount of the debt was £450 for principal, £31 13*s.* 6*d.* for interest, and £1 1*s.* for costs.

The simple contract debts amounted to £2162 7*s.* 3*d.*

The real estate of which the intestate was seised, or to which he was entitled at his death, consisted of the equity of redemption in certain freeholds, which had been sold subject to the mortgage debts, and the purchase-money paid into Court, and invested in a sum of £742 12*s.* 11*d.* stock.

The separate personalty was insufficient to pay the funeral expenses, and a small sum was due to the widow and administratrix on that account.

The following question was now raised on behalf of the simple contract creditors. It was not disputed that the official liquidator's debt was a debt by specialty, but it was contended that it was not a debt by specialty in which the heirs were bound, so as to give the liquidator priority over simple contract creditors, under the proviso at the end of the statute 3 & 4 Will. 4, c. 104.

The *London and Scottish Banking Company* was ordered to be wound up on the 6th of May, 1865; and after the 28th of November, 1865, the Defendant *Frances E. Robson's* name was settled on the list of contributories as the administratrix of the intestate in respect of ten shares in it which were held by him at his death.

Since that date calls had been made by the liquidator on the ten shares, amounting to the sum mentioned above.

Mr. *Eddis*, Q.C., and Mr. *Haddan*, for the Plaintiffs:—

It is quite clear that a debt under a specialty which does not bind the heirs ranks with simple contract debts only; that is to say, it takes no priority over them against real assets, as a debt under a specialty in which the heirs are bound would do: *Cummins* v. *Cummins* (1). In *Foster* v. *Handley* (2) it was decided that creditors by specialty in which the heirs are bound have priority, under the statute, against an equity of redemption in freeholds; and *In re Burrell* (3) decided the same with regard to an equity of redemption in copyholds.

The only question therefore is, whether an official liquidator, being a creditor for unpaid calls made since the winding-up, is a creditor by specialty in which the contributory's heirs are bound? We admit that he is a creditor by specialty, but we say that it is a specialty in which the heirs are not bound.

The question turns upon the 16th, 75th, and 76th sections of the *Companies Act*, 1862 (4).

The VICE-CHANCELLOR:—The 16th section was inserted in order to get over the difficulty which occasioned so much trouble in *Robinson's Executors' Case* (5).

(1) 3 J. & Lat. 64.

(2) 1 Sim. (N.S.) 200.

(3) Law Rep. 9 Eq. 443.

(4) The 16th section provides that the articles of association, when registered, "shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto; and there were in such articles contained a covenant, on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company . . . shall be deemed to be a debt due from such member to the company, and, in *England* and *Ireland*, to be in the nature of a specialty debt."

Sect. 75:—"The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time, or respective times, when calls are made."

Sect. 76:—"If any contributory dies, either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representatives, heirs, and devisees shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory; and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly."

(5) 3 Sm. & Giff. 272; 6 D. M. & G. 572.

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Mr. *Eddis* :—The result of that decision was, that an unpaid call made by the Master under the Winding-up Acts of 1848 and 1849 was not a specialty debt, although the shareholder, whose executors the contributories were, had executed the deed of settlement. In other words, the liability of the contributory to pay a Master's call arose, not under the deed of settlement, but under the statute: *Williams* v. *Harding* (1); and the liability arising under the statute was held not to be a specialty debt.

In this case it is with calls made under the winding-up only that we are concerned; with directors' calls we have nothing to do. Section 16 of the *Companies Act*, 1862, relates only to directors' calls; and with regard to them, inasmuch as the liability of the contributory is held to be the same as if he had signed and sealed the articles, and is declared to be a specialty debt, it may be that the shareholder's heirs would be bound to make good a claim in respect of such calls.

But it is otherwise with regard to a call made in the winding-up, which is regulated by the 75th section. That section, which for the first time makes the liability of a contributory a debt of the nature of a specialty, does not go on to say that it is a debt of the nature of a specialty in which the heirs are bound.

In *Williams* v. *Harding*, Lord *Kingsdown* comments upon *Robinson's Executors' Case*, and says (2) he understands the distinction turned upon this, that the Master's call was an enforcement of the obligation which the partner had contracted by entering into the partnership business, and not the enforcement of the specific covenants contained in the deed.

It follows that the nature of the specialty debt in this case is entirely defined by the statute, which does not say it is to be a specialty binding the heirs; and is not in any way affected by the provisions of the 16th section, which relate to the partnership liability, not to the liability to contribute.

Mr. *W. N. Lawson*, for the official liquidator:—

Resting entirely upon the construction of the statute, I say that the 16th, 75th, and 76th sections, taken together, plainly shew and

(1) Law Rep. 1 H. L. 9, 17. (2) Law Rep. 1 H. L. 29.

express that when a specialty debt is spoken of, what is meant is a debt by specialty which binds the heirs.

Mr. *Chitty*, for the Defendant, the widow and administratrix.

Mr. *Eddis*, in reply.

MR. BACON, V.C.:—

I am sincerely sorry, Mr. *Eddis*, to have to decide against you, and to come to a conclusion which must be unjust towards the other creditors.

But I can entertain no doubt on the question myself, having regard to the terms of the 16th section, which says that "the articles of association, when registered, shall bind the members to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant, on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act;" and that "all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in *England* and *Ireland* to be in the nature of a specialty debt."

And then a part of the machinery provided by the statute is the appointment of an official liquidator, who is empowered to do a great many things which are there specified; and amongst the rest (sect. 95), "to do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets." Then the Court is directed (sect. 98) to settle a list of contributories, and is empowered (sect. 102) to make calls; and by sect. 75, "the liability of any person to contribute to the assets of a company . . . shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinbefore mentioned." So that it is the same legal obligation which binds members and contributories at all times subsequent to

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the registration of the articles of association, and a winding-up order does not in this respect influence or change the nature of the original liability.

It is certainly possible that the decision in *Robinson's Executors' Case* (1) may mislead, when not properly considered. In that case there were what certainly appeared to be strong reasons for holding the testator's real estate bound to satisfy the claim. The executors had distributed the assets without notice of this claim; they had no notice that the official liquidator had any demand against them; and it was held that the claim of the liquidator was not one in respect of the original covenant which Mr. *Robinson* entered into, but one which arose under the general law which renders every partner liable to the demands of the partnership creditors.

I do not think there is anything in *Robinson's Executors' Case* from which it can be contended that the specialty referred to by the Act of 1862, which was passed after the decision in that case, is a specialty in which the heirs of the contributory are not bound.

The administration of the assets must, therefore, take place on the footing that the official liquidator is entitled to priority over the simple contract creditors, and there will be a declaration accordingly.

The costs of the Plaintiffs and Defendant, as between solicitor and client, will come out of the estate; the official liquidator will take his costs out of his own estate.

Solicitor for the Plaintiffs: Mr. *T. H. Dixon*, agent for Messrs. *Ranson & Co., Sunderland.*

Solicitors for the Official Liquidator: Messrs. *Redpath & Holdsworth.*

Solicitors for the Defendant: Messrs. *Shum & Crossman.*

(1) 6 D. M. & G. 572.

DONALDSON *v.* DONALDSON.

V.-C. B.
1870
July 9, 16.

Apportionment—Change of Interest without Death or Determination—4 & 5 Will. 4, c. 22, s. 2.

A settlor, by deed, assigned securities upon trust after his, the settlor's, death, during the minority of *A.* to pay such portion of the income as they should think proper, for the maintenance and education of *A.*; and when *A.* should have attained the age of twenty-one, and thenceforth until he should attain thirty, by and out of the income to pay to *A.* such annual sum as they should in their discretion think proper, not exceeding £5000, and accumulate the unapplied portion, and stand possessed of the accumulations upon the trusts thereinafter declared concerning the fund; and upon further trust, when and so soon as *A.* should have attained thirty, to stand possessed of the funds and the annual produce thereof, "upon trust that they and he shall pay unto and permit" *A.* "and his assigns to receive and take the whole of the dividends, interest, and annual produce of the same, during his life, for his and their own use and benefit," with limitations over. Upon *A.* attaining thirty:—

Held, that there must be an apportionment of the current dividends.

7 Ch 436
18 Ch D 163

PETITION.

By an indenture dated the 12th of April, 1852, and made between *Thomas Hudson* of the one part and three trustees of the other part, certain bonds, debentures, shares, mortgage debts, funds, and securities were assigned by *Thomas Hudson* to the trustees, upon trust from and after the decease of *Thomas Hudson*, by and out of the dividends, interest, and annual produce, to levy and raise the several annuities thereinafter mentioned; and in a certain event, by a sale of a competent part of the capital, to levy and raise a sum of £10,000. And it was thereby further agreed and declared that the trustees should stand possessed of all and singular the trust funds and the income thereof, after the death of *Thomas Hudson*, subject and without prejudice to the annuities, and to the trusts for raising the £10,000, upon trust that the trustees should, during the minority of his great nephew, *Charles Donaldson*, . . . "pay and apply such portion or share of the dividends, interest, and annual produce of the said trust funds and premises, as such trustees and trustee shall in their uncontrolled discretion . . . . think proper or expedient for his maintenance and education; and when and so soon as the said *Charles Donaldson* shall have

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attained the age of twenty-one years, and thenceforth until he shall attain the age of thirty years, or previously die, shall by and out of such interest, dividends, and annual produce, pay unto him, the said *Charles Donaldson*, or his assigns, such annual sum as the said trustees or trustee shall, in such their or his discretion as aforesaid, think proper or expedient, not exceeding in any one year . . . £5000; and shall in the meantime, and until the said *Charles Donaldson* shall attain the age of thirty years, accumulate . . . the unapplied portion of the said interest, dividends, and annual produce of the said trust funds and premises, . . . and shall stand possessed of and interested in all such accumulations as last aforesaid, and the income thereof, upon the trust thereinafter declared of and concerning the residue of the said trust funds and premises, and the annual income thereof; and upon further trust that they the said trustees and trustee shall, when and so soon as the said *Charles Donaldson* shall have attained the age of thirty years, subject nevertheless and without prejudice to the several trusts hereinbefore declared as aforesaid, stand possessed of and interested in all and singular the said trust funds and premises, including therein all such accumulations as last aforesaid, and the dividends, interest, and annual produce thereof, upon trust that they and he shall pay unto or permit, authorize, and empower the said *Charles Donaldson* and his assigns to receive and take the whole of the dividends, interest, and annual produce of the same trust funds and premises, during his life, for his and their own use and benefit," with limitations over.

Thomas Hudson died on the 14th of April, 1852.

Charles Donaldson assumed the name of *Hudson*.

The bill in the suit was filed on the 21st of October, 1852, for the purpose (amongst other things) of having the trusts of the above settlement carried into effect.

Charles Donaldson Hudson attained the age of thirty on the 11th of February, 1870.

No general certificate had yet been made in the suit; and the question on this Petition was as to a claim which was advanced by the persons interested in the residue to have the first sums of interest, dividends, and other periodical payments, which became payable after the 11th of February, 1870, in respect of the stocks,

funds, and securities which constituted the above trust fund, apportioned between them and *Charles Donaldson Hudson.*

Charles D. Hudson, on the other hand, claimed to be entitled to the whole of the periodical payments which became payable after the 11th of February, 1870.

Mr. *Kay,* Q.C., and Mr. *Jones-Bateman,* for *Charles D. Hudson,* the Petitioner:—

The language of the deed is very strong: "the trustees and trustee shall . . . when and so soon as the said *Charles Donaldson* shall have attained the age of thirty years," stand possessed of all the funds and income, upon trust "that they and he shall pay unto . . . *Charles Donaldson* . . . the whole of the dividends, interest, and annual produce . . . during his life."

It is quite clear there can be no apportionment, except under the statutes, and the only enactment which can possibly apply is sect. 2 of the 4 & 5 Will. 4, c. 22. That section directs an apportionment to be made "on the death of any person interested in any such rents, annuities, pensions, dividends, . . . or on the determination by any other means whatsoever of the interest of any such person." In other words, the Act was intended to benefit the estate of the person who should die or whose interest should determine. Here there was no one who died or whose interest determined when Mr. *Hudson* attained thirty years of age; hence the operation of the statute is excluded: *Campbell* v. *Campbell* (1).

St. Aubyn v. *St. Aubyn* (2) and *Wheeler* v. *Tootel* (3), which are decisions in favour of apportionment, have no application here, inasmuch as, in this case, the prior interest was augmented, not determined.

[*Fletcher* v. *Moore* (4) was also referred to.]

Mr. *De Gex,* Q.C., and Mr. *Busk,* for Respondents interested in the residue:—

Campbell v. *Campbell* is distinguishable from the present case. The trustees there might have paid the whole income towards the maintenance and education of *James Campbell.* It is to be

(1) 7 Beav. 482.
(2) 1 Dr. & Sm. 611.
(3) Law Rep. 3 Eq. 571.
(4) 3 Jur. (N.S.) 458.

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observed also, that the Master of the Rolls, Lord *Langdale*, gives no reasons for his decision.

Fletcher v. *Moore* was decided on a will, dated in January, 1834, of a testator who died in April, 1834; and the statute did not come into operation until the 16th of June, 1834. The question in that case was, whether rents reserved under leases made since the Act, in exercise of powers contained in an instrument before the Act, were apportionable. Vice-Chancellor *Kindersley*, in deciding that they were not apportionable, declined to follow Vice-Chancellor *Knight Bruce*, in *Lock* v. *De Burgh* (1); but in *Wardroper* v. *Cutfield* (2), His Honour explained that some of the reasoning in *Fletcher* v. *Moore* was unfounded, and that in that case it was a mere question of the construction of a will.

In *Shipperdson* v. *Tower* (3) the distinction attempted to be drawn between *St. Aubyn* v. *St. Aubyn* (4) and the present case did not exist. It may be that, in *St. Aubyn* v. *St. Aubyn*, the trust being to discharge the inheritance wholly from incumbrances, it was held there must be an apportionment on that ground; but in *Shipperdson* v. *Tower* it was held that there must be an apportionment, distinctly on the ground that there was a determination of the estate held by the trustees upon trust to accumulate.

[They also referred to *Llewellyn* v. *Rous* (5).]

Mr. *Pontifex*, for other parties.

Mr. *Kay*, in reply:—

The case is not within the statute at all, on the grounds stated by Vice-Chancellor *Kindersley* in his judgment in *Wardroper* v. *Cutfield*.

Campbell v. *Campbell* (6), which was decided on the 8th of May, 1844, was not cited to Vice-Chancellor *Knight Bruce* in *Shipperdson* v. *Tower* on the 25th of May, 1844.

There is no reason why the Court should follow the later rather than the earlier decisions on this subject.

(1) 4 De G. & Sm. 470.
(2) 10 Jur. (N.S.) 194; 33 L. J. (Ch.) 605; 12 W. R. 458; 10 L. T. (N.S.) 19.
(3) 8 Jur. 485.
(4) 1 Dr. & Sm. 611.
(5) Law Rep. 2 Eq. 27.
(6) 7 Beav. 482.

(5 J.C. 35 Beav. 594: 12 Jur. N.S.

MR. BACON, V.C.:—

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In deciding this case, I find myself in the same position as Vice-Chancellor *Malins* found himself to be in when the case of *Wheeler* v. *Tootel* (1) was before him.

Had the question been unfettered by authority, I should have thought it certainly not within the *Apportionment Act*. The words of the statute are, "on the death of any person interested" in such rents, "or on the determination by any other means whatsoever of the interest of any such person." These words were, long after the decision in *Campbell* v. *Campbell*, most carefully considered by Vice-Chancellor *Kindersley*, in *St. Aubyn* v. *St. Aubyn;* and His Honour, in a most elaborate judgment, came to the conclusion that the Act of Parliament had an application much more general than anybody had before supposed. In substance the decision came to this: that wherever a person is in receipt of rents and profits, and any change takes place whereby that person's interest ceases or is altered, and another interest begins, or a change of interest takes place, then an apportionment must be made.

I am wholly unable to see any distinction in principle and meaning between this case and that of *St. Aubyn* v. *St. Aubyn;* and if it be necessary to hold that it is impossible to reconcile *Campbell* v. *Campbell* with that decision, there is another case, that of *Shipperdson* v. *Tower* (2), which fully supports *St. Aubyn* v. *St. Aubyn*. So far, therefore, I am bound by authorities. In the last-named case Vice-Chancellor *Kindersley*, having the decision in *Campbell* v. *Campbell* before him, felt it his duty to hold that there must be an apportionment. It is unnecessary for me to read the judgment at length. His Honour comments on the preamble, points out the erroneous conclusion to which a superficial perusal of it might lead, and declines to read the Act according to the narrow view which the terms of the preamble might at first suggest.

The words upon which Mr. *Kay* has relied so strongly—namely, the direction to pay to *Charles Donaldson* "the whole of the dividends, interest, and annual produce of the same trust funds and premises"—seem to me to be by no means conclusive. I think there

(1) Law Rep. 3 Eq. 571, 573.

(2) 8 Jur. 485.

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is a clear right in the trustees to receive the apportioned part of the dividend; the words of the instrument most clearly and unmistakably give to the trustees the right to receive the money; and then as to the destination of the fund when received, I feel myself bound by a weight of authority which I cannot disturb. It can only be by some Court of higher authority that the decisions in *Shipperdson* v. *Tower* (1) and *St. Aubyn* v. *St. Aubyn* (2) can be reversed.

There will be a declaration that the dividends ought to be apportioned.

Solicitors for the Petitioner: Messrs. *Bennett, Dawson, & Bennett.*

Solicitors for the Respondents: Mr. *Joseph Whitehouse;* Mr. *William Bristow.*

(1) 8 Jur. 485. (2) 1 Dr. & Sm. 611.

MILLER *v.* COOK

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Feb. 9, 10, 11; *July* 13.

Unconscionable Bargain—Reversionary Interest—31 & 32 *Vict. c.* 4, *s.* 1.

The Defendant, a money lender, having agreed with the Plaintiff, who was just twenty-one, and was in difficulties, to lend him £150 on his reversionary interest under his father's will, exacted securities for £200, with interest at 20 per cent., reducible to 10 per cent. on punctual payment, and advanced only £123, but claimed interest on the whole amount secured. The Court declared that the securities should stand as a security for the money actually advanced with interest at 5 per cent., although the Plaintiff had been assisted by a solicitor, who, however, stated that he was not accurately informed of the transaction.

The jurisdiction of the Court over unconscionable bargains is not affected by the repeal of the Usury Laws, or by the 31 & 32 Vict. c. 4, s. 1.

THE Plaintiff, *S. F. Miller*, attained twenty-one in March, 1866, and was entitled under his father's will to a legacy of £500, and a share in the residue of his father's estate, both expectant on his mother's death. In the early part of 1867 he was in difficulties, and apprehended arrest, and seeing an advertisement in the public journals that Messrs. *Wilbrahams, George, & Co.* made advances on personal security, he called at the office. He was there told by Mr. *George* that he did not himself lend money, but that he would introduce him to a friend who did. He required the Plaintiff to pay him £2 2*s.* for the introduction, which the Plaintiff did, and *George* then took him to the office of the Defendant *Cook*. The Defendant having inquired the particulars of the security, told Plaintiff to call again in a few days; and, accordingly, on the 16th of April, Plaintiff, accompanied by Mr. *Ring*, his brother-in-law, and a solicitor, called at the Defendant's office. *Cook*, as the Plaintiff alleged, then told him that his interest under his father's will was contingent on his surviving his mother (which was not the fact), and that for that reason he could not advance him more than £150, for which he should require him to execute a mortgage for £200, with interest at 20 per cent., payable quarterly, but reducible on punctual payment to 10 per cent. Plaintiff being very much pressed for money, required an immediate advance, and *Cook* agreed to advance

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him forthwith £50. Some discussion took place as to the amount to be deducted, but ultimately £25 was paid to *Miller* in cash, and the following statement of account was arrived at:—

"For Mr. *S. F. Miller*, in account with Mr. *Robert Cook*.

"1867.

"April 16.—By mortgage of this date . .				£50	0	0
To cash for Mr. *George*	£5	0	0			
To bonus as agreed .	20	0	0			
To cash . . .	25	0	0			
				£50	0	0

"I have examined and do approve of the above account.

"*Richard Ring.* *S. F. Miller.*"

On this occasion the Plaintiff executed an indenture dated the 16th of April, 1867, between *S. F. Miller*, of the one part, and *R. Cook* of the other, whereby it was witnessed that in consideration of £50 paid to *Miller* by *Cook*, *Miller* assigned the legacy of £500 and his share under his father's will to *Cook*, upon trust in case default was made in payment to *Cook* of the said £50 on the 16th of May next, and interest at the rate of 20 per cent. per annum, or breach of any of the covenants, it should be lawful for *Cook* to sell the legacy and share, and out of the moneys arising from such sale to repay himself the said £50 and interest as aforesaid up to the 16th of May, and after that date interest thereon at the rate of 5 per cent. per month until the whole was paid.

Both the Plaintiff and *Ring* remonstrated against the hardness of these terms, but *Cook* was inexorable. He subsequently advanced £10 more, for which the Plaintiff signed a memorandum with interest at the same rate, which was also witnessed by *Ring*. A correspondence subsequently ensued in which Plaintiff referred to *Ring* as his solicitor. The next interview took place on the 6th of July, with a view to complete the transaction: and on this occasion *Cook* gave Plaintiff £88, and handed him a statement of account, which he required him to approve and sign, and the Plaintiff on this occasion accompanied *Cook's* son to the office of a Mr. *Mayhew*, a solicitor, where he signed the document, and Mr. *Mayhew* witnessed it. The account so signed was as follows:—

"Mr. *S. F. Miller*, in account with Mr. *R. Cook*.

"1867.	£	s.	d.	£	s.	d.
"May 6.—By promissory note, collaterally secured by mortgage				£150	0	0
"April 16.—To cash	£10	0	0			
To month's interest on £60 to May 16, at 20 per cent. per annum . . .	1	0	0			
To two months' interest on £60 to the 16th inst. .	6	0	0			
"May 20.—To cash	15	0	0			
To bonus as agreed on, on promissory note, £150 .	30	0	0			
To cash	88	0	0			
				£150	0	0

"I have examined and do approve of the above account this 6th day of July, 1867. *S. F. Miller.*

"Witness, *Fredk. Maline*, 16, *Great Marlborough Street*."

Cook further required him to give a promissory note for £150, and to execute a mortgage for the like amount. The deed was as follows:—By an indenture dated the 6th of July, 1867, reciting that the said *S. F. Miller* had charged the legacy and interest under his father's will with £50 and interest, it was witnessed that *S. F. Miller*, in consideration of the sum of £150 to *S. F. Miller* paid by *Cook*, had assigned the legacy and interest to *Cook* upon trust, in case default was made in payment of the said £150 on the 6th of July, 1869, and in the meantime of interest thereon at 20 per cent. quarterly, for *Cook* to sell the said legacy and share, and, after payment of expenses, to retain the sum of £150 and all interest due, and also £50 and all interest, and to pay the surplus to *Miller*. And it was further provided that the interest was to be reduced to 10 per cent. if paid within twenty-one days quarterly after quarter day. The Plaintiff accordingly executed this deed. *Cook* subsequently claimed interest at the rate specified on the whole £200, and in March, 1868, the Plaintiff demanded the particulars of the claim, and subsequently filed this bill for an account. There was a great deal of conflict in the evidence, both as to the amount actually advanced and the circumstances under

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which it was made. *Cook* relied much on the fact that the Plaintiff had legal assistance, but Mr. *Ring*, in his affidavit, denied that he acted as solicitor for the Plaintiff.

He stated that he understood that the Defendant should advance the Plaintiff £25 in cash, to be secured by a mortgage of £50 on the Plaintiff's interest under his father's will, with interest at 20 per cent. for one month, and afterwards 5 per cent. per month, and with a further sum of £10 to be secured by a memorandum of cash. These were interim advances pending the completion of a larger advance. In consequence of Mr. *Ring* protesting against he hardness of these terms, *Cook* agreed, in case the larger advance was completed, to return the £20 (bonus). The Defendant *Cook* stated to witness, that if the security proved as valuable as *Miller* alleged, and as in fact it was, he would advance a further sum of £165, thus making in all £200. For this he was to require a mortgage for that amount at 5 or 6 per cent. per annum, and a bonus of £50, which was to cover all expenses. Mr. *Ring* stated that he never knew the actual terms of the contract until the transaction was completed, but if he had known, he would have done all in his power to dissuade the Plaintiff from accepting them, as he considered them unfair and extortionate.

Mr. *Dickinson*, Q.C., and Mr. *Whitehouse*, for the Plaintiff:—

The Plaintiff does not rest his case on the circumstance that the security was reversionary, or that the interest was usurious, but on all the circumstances, including, doubtless, those which shewed that such an unfair advantage had been taken of the Plaintiff's necessity as amounted to unfair dealing, and took the case out of the statute. The first deed recited that £50, and the second that £150 had been advanced, while, in fact, no more than £123 was advanced, exclusive of the £5 paid to *George*. Then as to the interest, the first amount received was at the rate of 60 per cent., and afterwards £20 per cent. per annum. All these circumstances disclose a case of unfair dealing, against which this Court will relieve: *Bromley* v. *Smith* (1); *Tottenham* v. *Green* (2).

Mr. *Greene*, Q.C., and Mr. *Daly*, for the Defendants:—

The case of *Bromley* v. *Smith* was decided before the late Act

(1) 26 Beav. 644, 663. (2) 32 L. J. (Ch.) 201.

5 Jur. N. S. 833.

as to the sale of reversionary interests, and has no application to the present case. Reversionary property now stands on precisely the same footing as other property: *Webster* v. *Cook* (1); in that case the interest payable was the same as in this case. It is clear, therefore, that the unfair dealing referred to in the statute must be such as in any ordinary case would vitiate a contract.

Is there such a case here? Clearly not. The Plaintiff received the fullest information, and had been attended by his own solicitor. There had been neither *suppressio veri* nor *suggestio falsi*, nor fraud in any shape. The only equity alleged here was, that the Plaintiff was very much in want of money, and eager to get it, and that the interest was high; but that was not sufficient of itself to entitle him to relief in this Court. If it were to be held that no contract between a borrower and lender could stand where a high rate of interest was charged, it would lead to serious consequences.

Mr. *Dickinson*, in reply:—

Mere inadequacy of consideration, I admit, may be insufficient, but the Court will look at the surrounding circumstances. In *Shelly* v. *Nash* (2) the Court took that view. In that case a reversionary interest was sold by auction, and the question was, was there fraud or imposition. There are other cases, but they have not really altered the law of the Court: *Earl of Chesterfield* v. *Janssen* (3); *Croft* v. *Graham* (4).

July 13. SIR JOHN STUART, V.C.:—

This case has been strongly argued on the effect of the statutes against usury, and also on the construction of the recent statute as to contracts for reversionary interests. There are, however, objections to the transactions besides those which arise from the exorbitant rate of interest, and from the fact that the Plaintiff was dealing for a reversionary interest.

(1) Law Rep. 2 Ch. 542.
(2) 3 Madd. 232.
(3) 1 Atk. 352; 2 Ves. Sen. 125; Wh. & T. L. C. 3rd Ed. vol. i. p. 483.
(4) 2 D. J. & S. 155.

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But as to the question on the rate of interest, it has already been settled by the Court of Appeal that the repeal of the usury laws has not affected the right of the Court to give relief against unconscionable bargains. Here the rate of interest on the first security for £50 is 20 per cent. per annum for the first month and 5 per cent. per month—that is, 60 per cent. per annum after the first month. There can be no doubt that such a rate is exorbitant and unconscionable, the Defendant being secured by the assignment of the Plaintiff's reversionary interest in a legacy of £500. And in the subsequent deed, 20 per cent. per annum, reducible on punctual payment to 10 per cent. per annum, is excessive.

Considering that this rate of interest is payable on the whole amount secured, which is £200, and that only £123 was actually received by the Plaintiff, whereas interest is charged at these enormous rates on £200, the terms exacted seem to me unconscionable.

Even before the repeal of the Statutes of Usury, in the cases of *Plumbe* v. *Carter* (1) and *Jestons* v. *Brooks* (2), it was held at common law that an agreement, although not usurious, if it were a hard and unconscionable bargain, should not be assisted in an action for money had and received. In *Bowes* v. *Heaps* (3), where Sir *William Grant* gave relief against an unconscientious bargain, he noticed the Defendant's argument that he had not used any endeavours to prevail upon the Plaintiff to enter into the transaction. Sir *William Grant* said, "It is not every bargain which necessity may induce one man to offer, that another is at liberty to accept." In *Gwynne* v. *Heaton* (4) Lord *Thurlow* set aside the transaction as to a reversionary interest, although the Defendant was not charged with misleading the Plaintiff's judgment or tampering with his poverty. When it was urged that the bargain had been hawked about and offered to several persons who had refused it, Lord *Thurlow* said that this only shewed the necessity the man was under.

As to the argument on the recent statute concerning dealings with reversionary interests, the exception in the statute as to unfairness leaves the settled law as to cases like the present untouched.

(1) Note to *Floyer* v. *Edwards*, Cowp. 116.
(2) Ibid. 793,
(3) 3 V. & B. 117.
(4) 1 Bro. C. C. 1.

Nor is the case of the Defendant assisted by the presence of Mr. *Ring*, who appeared as the Plaintiff's friend. The evidence shews that the advice of Mr. *Ring* was founded on misunderstanding or misrepresentation. But there is a great difference between the intervention of a third party in transactions of this kind, and when there is no pressure of necessity which the friend cannot relieve. In transactions of bounty, indeed, where the advice of a judicious and impartial friend may assist and regulate, and in transactions where the pressure, not of want and of necessity, but of a confidential relation between the parties, requires the impartial advice of a friend, the intervention of a third party is important.

In the present case, besides the other objections to the contract, the terms of the power of sale are oppressive, and put the Plaintiff completely at the mercy of the Defendant. The power to sell without any notice to the Plaintiff enabled the Defendant at any moment to extinguish the right of redemption.

There must consequently be a declaration that the deeds are to stand as a security only for sums actually paid to the Plaintiff, with interest at 5 per cent. per annum, and an account must be taken of what is due upon that footing. The Defendant must, however, have his costs of the suit added to the amount to be found due on his securities, and there will be a decree for payment by the Plaintiff.

Solicitors for the Plaintiff: Messrs. *Lewis, Munns, & Co.*
Solicitor for the Defendant: Mr. *Henry Arnold.*

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In re CRAVEN AND MARSHALL.

Bankruptcy—Fraudulent Preference—Bankruptcy Act, 1869, *s.* 92.

Sect. 92 of the *Bankruptcy Act*, 1869, has not altered the law with respect to fraudulent preferences, and it is still necessary, in order to constitute a fraudulent preference, that the conveyance or transfer be made voluntarily and in contemplation of bankruptcy.

Therefore, where a creditor told his debtor "that he should like his money repaid," adding that "he was determined to have either the money or security," and the debtor accordingly conveyed certain property in part satisfaction of the debt, and presented a petition for liquidation shortly afterwards:—

Held, that the conveyance was valid, and could not be set aside as being a fraudulent preference.

Affirmed by J.J. 6 Ch 71

THIS was an appeal by a purchaser under a conveyance dated the 2nd of February, 1870, against an order of the Judge of the County Court of *Huddersfield*, made on the application of the trustee under liquidation, setting aside a conveyance of certain real property situated at *Bradford* on the ground of its being a fraudulent preference.

The facts appeared to be as follows:—

Abram Craven (the debtor) was indebted to *Phineas Craven* (the Appellant) in two sums of money of £200 and £250, secured by two promissory notes, on which interest had been duly paid up to January, 1869. The debtor carried on business as an innkeeper at *Huddersfield* in partnership with *Marshall*, and the business became so unprofitable that the partners had to stop payment. On the 22nd of March, 1870, the debtor presented a petition for liquidation by arrangement under sect. 125 of the *Bankruptcy Act*, 1869; and on the 16th of April the trustee was appointed.

It appeared that in October, 1869, the Appellant, becoming alarmed at the state of the business of the debtor, was desirous of being paid, or of having some security for his money; and his affidavit (filed on the 7th of June, 1870), so far as is material, was as follows:—

"4. I had not pressed the said *Abram Craven* for payment; nor

had the loan been named between us for some time before the month of October last (October, 1869).

" 5. At that time I had to go to *Huddersfield* to look at some machinery in which I was interested, and I looked at the bankrupt's place of business to see if Mr. *Marshall* could give me any information as to the address of a person I wanted to see, and he went with me to try and find such person, and I afterwards returned with him to his place of business, and stayed about an hour or so.

" 6. Whilst I was there I observed that both *Marshall* and his wife seemed to be the worse for liquor, and I also observed that *Marshall* paid some accounts, which seemed to be his own private accounts, with money which I saw him take from the till of the firm, and I did not see him make any entry of the payment.

" 7. From my observation the business seemed to be conducted in a very unsatisfactory way, and I made up my mind to mention the matter to the bankrupt *Craven*, and insist upon payment of or security for my claim.

" 8. *Abram Craven* was expected there that night, and I waited for him, and when he came I asked him if he was returning the following day to *Thornton*, being the Sunday, and he said he was, and I asked him to call at my house at *Bradford* on his road.

" 9. He called the next day accordingly, and dined with me, and after dinner I walked up with him towards *Thornton*. I had not previously on that day mentioned his affairs to him, nor had he to me; but as we were walking I told him what I had observed the day before, and said that I should like my money to be repaid.

" 10. He said that he could not very well pay me just then, but that if I were wishful to have the money, he would have to try and get it.

" 11. He did not tell me that his firm were in difficulties, or had been served with writs. On the contrary, he said they were making money, and took £30 a week, of which half was profits. I mentioned to him his property in *Thornton Road*, as I knew he had it, and asked him how it stood, and he told me the amount that was owing to the building society. We discussed the value of that property, and came to the conclusion that there was not enough value in it to pay both me and the building society.

" 12. He said he would give me a security upon it if that would

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do, and I told him that I was determined to have either the money or security, and he then agreed to give me a second mortgage upon the property.

"13. After that I mentioned my claim to Mr. *Hargreaves*, of *Bradford*, solicitor, who advised me, as the property was not worth enough to cover me, to buy it out-and-out; and I saw the bankrupt *Craven*, and told him I would rather buy the property: he demurred at first, but finally agreed.

"14. He then went with me to Mr. *Hargreaves*, who explained to us the difference between a second mortgage and a conveyance, and we finally instructed him to prepare a conveyance; but I did not finally decide at that time whether I would pay off the building society or leave their mortgage subsisting. I afterwards decided not to pay off that mortgage, and I arranged with the bankrupt *Craven* that I should take the equity of redemption at the sum of £400, and I so informed the said Mr. *Hargreaves*, and requested him to get the deed ready.

"15. He was some time preparing the deed after the time when he received instructions, which I believe would be on the 6th of December, 1869; and I called several times on him to ask if he was ready; finally, I was told that the deed would be ready by the 3rd of February last; and I saw the said bankrupt, and requested him to attend with me at the office of the said Mr. *Hargreaves* to sign it, and we did so on that day.

"17. I further say that up to that time the said *Abram Craven* had not told me, nor had I any idea whatever, that he or his firm were in pecuniary difficulties, or had been served with writs, or must stop payment. On the contrary, he said, when I was with him at Mr. *Hargreaves*, that it did not much matter whether I got a conveyance or a second mortgage, as he should soon be in a position to get the property back again."

The debtor, in his affidavit, stated that in October, 1869, he knew that he and his partner were unable to meet their liabilities, and that the Appellant was also aware of the fact; and in cross-examination stated that the Appellant "pressed him very heavy" for payment; and in answer to a question by the County Court Judge, said, "I had no other motive in giving the deed but to make him

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secure. I might do it so that he may be better off than any of the other creditors."

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Appellant:—

The deed in question is not an act of bankruptcy, since it does not comprise all the property of the debtor, and it is not void under 13 Eliz. c. 5. Therefore it can only be set aside on the ground of its being a fraudulent preference. Although the conveyance was not executed until the 3rd of February, 1870, there was an agreement to convey in October, 1869; and this case, therefore, does not come under sect. 92 of the *Bankruptcy Act*, 1869, since no Act of Parliament is retrospective unless it is so expressly enacted: *Moon* v. *Durden* (1); *Evans* v. *Williams* (2).

In *Harman* v. *Fishar* (3), Lord *Mansfield* said, "Where an act is done, and the single motive is not to give an unjust preference, the creditor will have a preference." Where the conveyance is not voluntary nor in contemplation of bankruptcy, it is valid: *Belcher* v. *Prittie* (4); and where it is not voluntary, even though a desire to benefit the creditor may exist, it is also valid: *Brown* v. *Kempton* (5).

In order to set aside a transfer to a creditor, the assignee must prove that it was made voluntarily by the debtor. *Van Casteel* v. *Booker* (6), *Strachan* v. *Barton* (7), and *Edwards* v. *Glyn* (8), shew that the slightest request to pay made by the creditor is sufficient to prevent the transfer being voluntary: *Bills* v. *Smith* (9). In *Hunt* v. *Mortimer* (10) the Court was unwilling to extend the doctrine of fraudulent preference. If, however, the case comes within the provisions of sect. 92 of the *Bankruptcy Act*, 1869, then we are equally entitled to an order in our favour, as we are a purchaser in good faith and for valuable consideration; and the debtor never became bankrupt, the proceedings being by liquidation.

(1) 2 Ex. 22.
(2) 2 Dr. & Sm. 324. 11 Jur N S 256
(3) Cowp. 117.
(4) 10 Bing. 408.
(5) 19 L. J. (C. P.) 169.
(6) 2 Ex. 691.
(7) 11 Ex. 647.
(8) 2 E. & E. 29.
(9) 6 B. & S. 314. 11 Jur N S 155
(10) 10 B. & C. 44.

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[The CHIEF JUDGE:—There is no difference in this respect between proceedings under a bankruptcy and under a liquidation by arrangement.]

Under the new Act the transfer must be voluntary and made in contemplation of bankruptcy, as decided in *Brown* v. *Kempton* (1).

Mr. *Winslow*, and Mr. *F. Knight*, for the Respondent, the trustee:—

Notwithstanding pressure, or even a request, the transfer may be voluntary, and it is for the jury to say whether it is so or not: *Cook* v. *Pritchard* (2); *Cook* v. *Rogers* (3). Under sect. 92 (4) such a transfer as this is absolutely void, and not voidable; and under that section, even if pressure has been used, the transfer can be held void, and *Brown* v. *Kempton*, and that class of cases, no longer apply. The conveyance itself is an act of bankruptcy under sect. 6, sub-s. 2, and therefore is not a protected transaction with sect. 95.

Mr. *De Gex*, in reply.

June 16. MR. BACON, C.J.:—

This case has been argued with great ability, and at great length, but not at greater length than its importance has fairly required; for it raises two questions, each of considerable interest, the solution of which must regulate the administration of estates in bankruptcy in all cases in which the like circumstances shall occur.

(1) 19 L. J. (C. P.) 169.
(2) 12 Ibid. 121.
(3) 5 Moo. & P. 353.
(4) Section 92 is as follows: "Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due, from his own moneys, in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith, and for valuable consideration.

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The first question relates solely to the law as it has been established by a series of decisions extending over many years, and by which it has been declared that, to constitute a fraudulent preference by a debtor of one or more over all his other creditors (in which case the preference would be ineffectual against assignees in bankruptcy), two things must concur. First, the act of preference must be voluntary on the part of the debtor; and, secondly, it must have been done by him when in such a state of insolvency as that it may or must be inferred that bankruptcy was then in his contemplation. The second question is this: Has the 92nd section of the *Bankruptcy Act* of 1869 changed the law in bankruptcy as it was established before the passing of the statute referred to—or, are the principles and rules of law theretofore acted on to be still applied and acted on in all cases in which the former law has not been altered in express terms, and in which new or different rules and principles have not been established by the Statute? The appeal motion upon which the Court is now required to decide is brought against an order of the learned Judge of the County Court of *Yorkshire*, sitting at *Huddersfield*, by which it was decided that a conveyance by one of the debtors, whose estate is in course of liquidation by arrangement, of certain freehold premises in *Bradford* was a fraudulent preference, and the conveyance was therefore set aside. The facts proved in evidence may be thus stated:—[The Chief Judge stated the facts as above set out.] A great many cases were referred to in the argument upon the first question in this case; and it was insisted, on the part of the Appellant, that the result of the evidence was to establish that in fact the conveyance in question was made at the instance and upon the request of the creditor *Phineas Craven;* that such request by him amounted to pressure, and deprived the transaction of that mere spontaneity which is essentially necessary to constitute a fraudulent preference; and, further, that it was within the protection of the concluding sentence of the 92nd section of the Act of 1869, as a purchase in good faith and for a valuable consideration. On the part of the trustee it was argued that the facts proved established a fraudulent preference; for that, not only did *Abram Craven* state that his motive in executing the deed was to secure *Phineas Craven* against loss, and that he might be better

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off than any of the other creditors, but that it was also clear that no pressure had been used; that the expression used by *Phineas Craven*, that he should like his money to be repaid, was far short of anything like pressure; and that the friendly relations which were admitted to have subsisted between the two men, and the knowledge imputed to *Phineas Craven* of the insolvent condition of *Abram Craven* (which is, however, denied by the former), explained the motive with which the conveyance was made, and brought it within the law by which a voluntary conveyance by an insolvent debtor in favour of a particular creditor is void against assignees in bankruptcy, as being made in fraud of the rights of the other creditors; and many authorities were referred to on both sides, in support of their several contentions.

The question whether what is alleged to have been a preference was voluntary or not, is one of fact, and has been at all times so stated and considered. It is for a jury, if the question arises before them, to say whether or not the just inference from the evidence is that the act done was voluntary on the part of the debtor; and if, as in the case before me, the like duty is to be discharged by the Judge, the same rules must guide his judgment as ought to influence a jury in pronouncing their verdict. It is not surprising, therefore, that this question should have been frequently litigated. In some of the cases, exception has been taken to the directions given to the jury by the Judge. In others, it has been contended that the inference drawn by the jury was not justified by the evidence. But the Courts, in dealing with these questions, seem never to have departed from the rules originally established; and although it is true that in some of the earlier cases a stronger case, or rather a stronger degree of pressure, appears to have been required in order to deprive the debtor's act of that spontaneity which is requisite, in order to set aside the transaction, it is no less true that in later cases it has been held that a demand or request made by a creditor, although not accompanied by any threat, or expressed in angry or even very urgent terms, is still sufficient to deprive the act of a voluntary character. In *Hunt* v. *Mortimer* (1), Lord *Tenterden* said that some of the previous cases had gone too far as against the creditor; and in

(1) 10 B. & C. 44.

Edwards v. *Glyn* (1), two of the Judges, referring to the same points, and contrasting the more recent with the former decisions, observed that the tide had turned in a like direction.

I believe that most of the cases which have any bearing, certainly all that have any direct bearing, on the question at issue, have been referred to in the course of the discussion before me. I have considered all of them as carefully as I am able, and although I do not think it necessary to observe upon them in detail, it is for this reason, that in my judgment none of them affect or alter the principle of law upon which they have been, and upon which this case must be, decided. For, in *Marks* v. *Feldman* (2), Baron *Martin*, referring to Lord *Mansfield's* judgment in *Alderson* v. *Temple* (3), says, "If a man, about to become bankrupt, and knowing that the law intends that the creditors shall share equally in the property, voluntarily and not upon pressure, does an act which contravenes the spirit of those bankruptcy laws, the goods or the money delivered or paid over can be recovered back from the person to whom he may have only paid a just debt;" and in that case, which is perhaps the most recent case in which the principle is adverted to, I find that the same rule of law is recognized and adopted by the present Judges. And I am not aware of any authority in which a preference has been held to be fraudulent, unless it has been satisfactorily proved to have been the voluntary act of the debtor. All, therefore, that the Court is now required to do, in the first place, is to ascertain and declare upon the facts proved whether or not the execution of the deed in question was such a voluntary act on the part of the debtor as to make it fraudulent, and therefore void against the other creditors. That it was in contemplation of bankruptcy is obvious, and not to be disputed.

I have, then, in the evidence I have referred to, clear proof that the deed did not originate with the debtor; it was the request of the creditor for payment which led to the conversation detailed in paragraphs 10, 11, and 12 in the affidavit of *Phineas Craven*, and ultimately to the execution of the deed. It has been said that the pressure here stated was gentle, as it unquestionably was; and, considering the relation of the parties, it could hardly be expected to

(1) 2 E. & E. 29.

(2) Law Rep. 5 Q. B. 275, 283.

(3) 4 Burr. 2235.

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be more urgent, but it was made in terms not to be misunderstood; for *Phineas Craven* says, "I told him I was determined to have either the money or security, and he then agreed to give me a second mortgage on the property." *Abram Craven* has been cross-examined and re-examined, and he does not dispute or deny the truth of the statement I have just read. Now, at this time, *Phineas Craven* was the holder of two promissory notes, upon which, if he had put them in suit, he could have obtained judgment in a few days. If he knew that *Abram Craven* was insolvent (which is not proved, for although *Abram Craven* asserts it, *Phineas Craven* as clearly denies it), there was the greater reason that he should press for payment or security; but whether he did or did not know of *Abram Craven's* insolvent condition, I must take it as a fact proved that it was the creditor who exercised the pressure (*Abram Craven* says, "he pressed me very heavy"), that the deed was executed in consequence of that pressure; and that it was not in any true sense the voluntary act proceeding from the voluntary offer of the debtor.

If this be so, all that ensued after the interview I have been referring to becomes of no material importance; the property on which it was first intended and agreed that the security should be made had been mortgaged to a building society for such an amount as would make the equity of redemption of less value than the sum due to *Phineas Craven*. Instructions being given to Mr. *Hargreaves*, the solicitor of Mr. *Phineas Craven*, an absolute conveyance was, for the reasons stated in his affidavit, made instead of a second mortgage. It was executed on the 3rd of February last, and is the instrument mentioned in the order appealed against.

But, then, it has been also argued that the order must be sustained upon the words of the 92nd section of the Act of 1869, for that enactment materially alters the law theretofore prevailing; that the words "with a view of giving a creditor a preference over the other creditors" were introduced for the purpose of relieving cases of fraudulent preference from the difficulties adverted to in some of the authorities where juries have been embarrassed and the cases complicated by the existence of mixed motives on the part of the debtor, and by considerations of the degree of pressure by creditors, and of the circumstances under which such

pressure was exercised. And I am inclined to think that some such view of the proper construction of the Statute must have been present to the mind of the learned Judge when he made the order. I have not the advantage of any statement of the terms in which the judgment was pronounced (which I regret), and the inference I have suggested is drawn from the debtor's answer to a question which was put to him by the learned Judge at the close of his examination, when he said, "I had no other motive in giving the deed but to make him secure. I might do it so that he may be better off than any of the other creditors."

It was also suggested, but not very strenuously insisted upon, that the execution of the conveyance was of itself an act of bankruptcy under the 6th section of the Act, as being a fraudulent conveyance of part of the debtor's property, and therefore not within the protection of the 1st sub-section of the 95th section; but it is obvious that this contention cannot prevail, the consideration for the conveyance being a valuable one, the conveyance itself being (as has not been disputed) in good faith, and no more an act of bankruptcy than any other payment or satisfaction of a debt justly due would have been.

In my opinion, however, the Statute now in force has in no respect, so far as affects the question before me, altered that law in bankruptcy which had been well established by a long series of decisions, and was well known long before the Statute came into operation. Wherever it was intended that the law should be altered, such alteration is expressed in clear, intelligible, and unmistakeable terms. That it can have no retrospective operation unless such operation be expressly enacted, is a settled rule of law; and by the 20th section of the *Bankruptcy Repeal Act*, 1869, (repealing the former Statutes in Bankruptcy) it is enacted that the repeal shall not affect the validity or invalidity of anything done or suffered before the commencement of that Act, which came into operation at the commencement of the present year. The fraudulent preference which is made void (not voidable only as it was under the former law) by the Statute, is the same fraudulent preference as was invalid before, for the same reason, and under the same circumstances; the motive or view which may have actuated the debtor, wholly or partially, is not material, unless it has also

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induced him, without pressure or just request from his creditor, to give him a preference over his other creditors. To hold otherwise would be to give to the Statute a meaning and effect not warranted by the terms of the 92nd section, and would, moreover, be of most dangerous result as regards transactions very frequent in this commercial country; for in almost all, if not all, similar dealings, the debtor, when he yields to the pressure of his creditor, must know that by so yielding the creditor will obtain a preference; but he knows also that by not yielding he not only resists a just demand, but may provoke immediate proceedings by the creditor. In this case I find a clear agreement come to between the parties, on, if not before, the 6th of December last, when the Statute had not come into operation—an agreement the specific performance of which might have been compelled by the creditor, unless the *Statute of Frauds*, which the debtor was under no obligation to set up, had been pleaded. The amount of the debts, the value of the property conveyed, and the good faith of the whole transaction, appear to me to be clearly proved; and I am therefore of opinion that the order appealed against must be discharged, inasmuch as it is in contravention of the rights of "a purchaser in good faith and for a valuable consideration."

There will be no costs of the proceedings in the Court below But the Appellant will take back his deposit, and the Respondent, who has made the claim now decided against, must pay him the costs of the appeal.

Solicitors for the Appellant: Mr. *W. Flower*, for Messrs. *Wood & Killick, Bradford.*

Solicitors for the Respondent: Messrs. *Learoyd & Learoyd*

In re BRITISH AND AMERICAN STEAM NAVIGATION COMPANY.

V.-C. S.
1870
May 30, 31.

WARD'S CASE.

Contributory—Past Member—No Notice of Allotment—Execution of Transfer in Blank.

At the instance of the promoters of a limited company, and, as he was told, *pro formâ*, *W.* signed an application for 200 shares, and at the same time executed a blank transfer. He paid nothing, never executed the articles of association, received no notice of allotment, and heard nothing about the company till he received notice from the liquidator appointing a day to settle the list of past members:—

Held, that he was entitled to be taken off the list, though it appeared that the shares had been, in fact, allotted to him, that deposits and calls had been paid on them by some persons without his knowledge, and that, by the transfer executed by him in blank, and subsequently filled up, the shares had been transferred to one of the promoters.

IN the early part of 1865, the *British and American Steam Navigation Company, Limited*, was registered, under the Act of 1862. The principal promoters were Messrs. *Fernie* and Messrs. *Holdernesse & Chilton*, both firms of *Liverpool*, shipowners, with their friends. On the 3rd of June, 1865, Mr. *Broadbent*, a clerk in the employment of Messrs. *Holdernesse & Chilton*, called on *Henry J.* and *George Ward*, and induced them each to sign a separate application for 200 shares, and also at the same time to sign a paper in blank, which was, in fact, a transfer paper not filled up. *Broadbent*, in pursuance of the instructions he received, assured the Messrs. *Ward* that they were under no liability, and would have nothing to pay. *Broadbent* then handed the papers so signed, with others, to the secretary of the company, a Mr. *Hayes*.

The letter of application was, omitting formal parts, in the following terms:—

"Gentlemen,—Having paid to your bankers the sum of £200, being a deposit of £1 per share on 200 shares in the above company, I hereby request you will allot me that number, and I agree to become a member of the company in respect of such shares, or of any less number you may allot me, and to execute the articles of

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association when required, and I request that my name may be placed on the register of members for the shares so allotted.

Name in full: *Henry John Ward.*
Residence: 41, *Canning Street, Birkenhead.*
Profession or business: Steamboat proprietor."

The application by Mr. *George Ward* was in similar terms.

The following letter was subsequently found among the papers of the company; but it appeared from the evidence that it was never sent to the applicants, nor was any notice of allotment ever communicated to them till after the company was in liquidation, nor did they ever execute the articles of association:—

"*British and American Steam Navigation Company, Limited: Offices,* 48 *Brown's Buildings, Exchange, Liverpool,* June 12, 1865.

"Sir,—I am directed to inform you that the directors have considered your application for shares in this company, and they have allotted to you 150 shares, the payments on which are as follows:—

"Deposit of £1 per share on 150 shares allotted .	£150
"Further payment of £1 10*s.* due on allotment .	225
"Together	£375
"Deposit received from you on application .	200
Balance due by you . .	£175, which

I have to request that you will pay to the *Royal Bank of Liverpool.*

"I remain, &c.,

"*H. J. Ward,* Esq. *J. B. Hayes,* Secretary."

A similar letter was found in reference to Mr. *George Ward.*

It appeared, further, that the transfers executed in blank by Messrs. *Ward* were filled up with the date 23rd of February, 1866, each from Messrs. *Ward* to *David Fernie.*

In August and September, 1865, two calls were made, but no application or notice to Messrs. *Ward,* or either of them, was ever made or given.

On the 31st of May, 1866, in pursuance of notices duly adver-

tised, it was resolved to wind up the company voluntarily, and that Mr. *Barrow* be appointed liquidator.

The Messrs. *Ward*, from the 3rd of June, 1865, never received any communication from, or, in fact, knew anything at all about, the company till the 18th of July, 1867, when they received a notice from the liquidator, appointing the 25th of July for settling the list of past members in the company.

The debts amounted to £315,068 9*s.* 5*d.*, and there were no assets.

It appeared from the evidence that the letter of allotment never was issued or notice of allotment given, and that though money was paid on the Messrs. *Ward's* shares, it was not paid by them.

Sir *Roundell Palmer*, Q.C., Mr. *Plummer*, and Mr. *R. G. Williams*, of the Common Law Bar, for the Messrs. *Ward*, contended that, on the authority of *Robinson's Case* (1), their names ought to be removed from the list. They were stopped by the Court.

Mr. *Dickinson*, Q.C., and Mr. *Robinson*, for the liquidator:—

It is proved that Messrs. *Ward* signed the application for shares, and executed a transfer, which could only be intended as a transfer of shares. It is also proved that the deposits and calls were paid by some person in respect of the shares applied for and allotted to Messrs. *Ward*, and the only fair inference that can be drawn from these admitted facts is, that Messrs. *Ward*, by their acts, and especially by the execution of the transfer, constituted the transferee of the shares allotted to them their agent: *Crawley's Case* (2); *Hammersly* v. *De Biel* (3).

Secondly, whatever might be the equity between the Messrs. *Ward* and the directors of whose conduct they complained, that could have no application against the creditors, who could only look to the register.

Sir John Stuart, V.C.:—

There is no pretence for placing Messrs. *Ward* upon the list of contributories of this company.

(1) Law Rep. 4 Ch. 330. (2) Law Rep. 4 Ch. 323.
(3) 12 Cl. & F. 45.

V.-C. S. 1870 WARD'S CASE.

The case against them is rested upon two grounds:—First, that Messrs. *Ward* became by contract shareholders or partners in this company. In my opinion that ground is unsustainable, and indeed it was not very much relied on by the counsel for the liquidator. In order to have a binding contract, there must be certainty as to the subject-matter, and the assent and full knowledge of both the contracting parties. What is said in this case to constitute the contract is an application for a certain number of shares, or for such other number as should be allotted. But this is no agreement to take any certain number of shares. When an application for shares is made, and that application is granted, and certain shares allotted, and the allotment is communicated to the applicant, a contract may be said to be entered into. But in this case nothing was communicated to the applicant as to the number of shares allotted, or whether any shares were allotted to him at all. There is not, therefore, here that sort of assent or acceptance, or that certainty as to the subject-matter, which is necessary to the validity of a contract.

The second ground is that, upon a principle established by a decision of the House of Lords, if one man induces another, upon the faith of certain representations, to do some act, he may be compelled in a Court of Equity, at the instance of the man who has done such act, to make those representations good. But consider what is the representation that was made in this case. The argument here is, that by signing the application for shares and the blank transfer, Messrs. *Ward* enabled the company to hold out to the world that they were shareholders. In order to make the doctrine applicable there must be certainty as to the subject-matter of the representation. What was the representation? It was an application for an uncertain number of shares; and the representation was, that the applicant desired his name to be placed on the register of shareholders, and that he agreed to become a member—*i. e.*, to accept that number of shares in the company which might be allotted to him. In addition to this circumstance the representation, such as it was, was founded on a falsehood, because the representation was, that one of the *Wards* had paid £200 and the other £150, and this was known to be a falsehood by the parties to whom the representation was said to be made. To such

a state of things the doctrine in *Hammersly* v. *De Biel* (1), has no application.

As to the argument, that the representation to the directors was a representation to the creditors, the answer is that the doctrine of *Hammersly* v. *De Biel* does not give a right to third parties, but to those to whom the representations were made. The acceptance of the application was never notified to the purchaser, and it recited the payment of money which never was paid, and no information as to the transaction was given to the applicant until the winding-up of the company. The execution by Messrs. *Ward* of a transfer in blank did not authorize the person to whom the transfer was handed to insert in it any number of shares he pleased, or of shares allotted without the assent or even the knowledge of the applicant. In my opinion, the application, in the events that happened, and the deed of transfer (if it can be called such), were and are a nullity, from the want of knowledge and certainty as to the subject-matter of the transaction. Messrs. *Ward* must therefore be removed from the list, and must have the costs of this application. The liquidator must have his costs out of the estate.

With regard to *Crawley's Case* (2), the decision proceeds on the circumstance that what took place was within the knowledge of the applicant. That was not the case here.

Solicitors for the Applicants: Messrs. *Nethersole & Speechly.*
Solicitors for the Liquidator: Messrs. *Flux, Argles, & Rawlins.*

(1) 12 Cl. & F. 45.

(2) Law Rep. 4 Ch. 323.

V.-C. S.
1870
June 1.

GUNNELL *v.* WHITEAR.

Trustee—Payment into Court—Costs.

Any trustee who entertains a reasonable doubt or difficulty as to the title of the person who claims to be his *cestui que trust*, should pay the funds into Court under the *Trustee Relief Act*.

A trustee who, entertaining such doubt, did not pay the funds into Court, but by his conduct caused the institution of a suit, was allowed out of the funds only the costs that he would have been entitled to if he had paid the funds into Court under the Act, and the costs of appearing on the Petition.

HANNAH FULLAGER, who died in August, 1869, by will, in April, 1864, gave, devised, and bequeathed all her real and personal estates unto her friend, the Plaintiff *Harriet Gunnell*, wife of the Plaintiff *Charles Matthias Gunnell*, her heirs, executors, administrators, and assigns, to and for "her own sole use and benefit," and she appointed *Harriet Gunnell* sole executrix.

The Defendant, *R. B. Whitear*, had, as the executor under the will of *Benjamin Whitear*, acted in the execution of the trusts of a marriage settlement under which *Hannah Fullager* claimed.

Shortly after the death of *Hannah Fullager*, a correspondence commenced between the solicitors for the parties in reference to her estate and the property given by her to *Harriet Gunnell;* and in September, 1869, the solicitor for the Plaintiffs suggested that *R. B. Whitear* should make over the trust funds and property to his client, *Harriet Gunnell*. The solicitor for *R. B. Whitear* stated that the *Bank of England* would not allow stock to be in the name of a married woman alone; suggested that Mr. *Gunnell* should join in the release; mentioned that Mr. and Mrs. *Gunnell*, who were residing at *Boulogne*, went by the name of *Williams;* and asked whether there was any reason for that, and whether Mr. *Gunnell* had been bankrupt, and, if so, whether he had obtained his certificate. The replies were, that the stock could be transferred into the names of *C. M. Gunnell* and his wife; that he would join in a receipt; that he had never been a bankrupt or insolvent; and that he had used the name of *Williams*. The solicitor for the Defendant, after further correspondence, stated,

on the 30th of October, 1869, that he understood, upon good authority, that Mr. *Gunnell* had been insolvent, and only received his discharge on condition of his paying an annual sum to his creditors; and he asked whether that sum had been paid, and whether Mr. *Gunnell's* absolute discharge had been obtained; and said that, after he had received an answer to his questions, he should ask the advice of counsel on Mr. *Whitear's* behalf. No further correspondence took place between the solicitors, but in November, 1869, this bill was filed, charging that the Defendant still declined to transfer the trust property (£1085 3*s.* 4*d.* and £148 7*s.* 9*d.* £3 per cent. consols, and the balance remaining unpaid of a mortgage debt of £1000, and interest) to the Plaintiffs, and praying that he might be decreed to transfer and assign the trust funds, and the securities for the same; and to pay the costs of this suit.

A case was, in October, 1869, prepared and laid before counsel on behalf of the Defendant, but before any opinion as to how he should act was received, the bill was filed. The Defendant transferred the consols into Court to the credit of the cause.

Mr. *Dickinson*, Q.C. (Mr. *Chapman Barber* with him), for the Plaintiffs, after stating the facts, was stopped by the Court.

Mr. *Hughes*, Q.C., and Mr. *B. B. Rogers*, for the Defendant:—

The difficulty which the Defendant had to consider was caused by the insolvency of Mr. *Gunnell*, and the use only of the words "sole use and benefit." The word "sole" does not mean the same thing as the word "separate." Was the property given for Mrs. *Gunnell's* separate use? If Mr. *Gunnell* had not been insolvent, that question would have been immaterial, because, if the trust funds were for her separate use, she could have given a good receipt for them; but if not, he could have joined in the receipt and discharged the Defendant. The words "sole use and benefit" do not in a will create a separate estate; and as the husband had been insolvent, the Defendant was justified in seeking the advice of counsel, particularly as the cases of *Gilbert* v. *Lewis* (1), *In re*

(1) 1 D. J. & S. 38.

V.-C. S. 1870 GUNNELL v. WHITEAR.

Tarsey's Trust (1), *Lewis* v. *Mathews* (2), and *Massy* v. *Rowen* (3), are at variance. The only object which the Defendant had in view was to pay the trust funds to the right person

[The VICE-CHANCELLOR:—As soon as the Defendant had a reasonable cause for so doing, he should have paid the funds into Court under the *Trustee Relief Act.*]

There was the difficulty arising out of the use of the word "sole."

[The VICE-CHANCELLOR:—If the Defendant's solicitor was aware of the cases, and if he had a reasonable doubt as to their application to this case, the funds should have been paid into Court.]

Who could say whether there was a reasonable doubt in this case? A case was laid before counsel for advice, but before his opinion could be obtained, this bill was filed.

[The VICE-CHANCELLOR:—If a trustee has trust funds in his hands, and if the person who is *primâ facie* the *cestui que trust* asks him to pay them, and he honestly entertains a doubt or difficulty, his duty is to pay the funds into Court, and not to compel the *cestui que trust* to institute a suit.]

The moment the fact of insolvency of the husband was discovered the case was laid before counsel, asking whether the funds ought to be paid over, or into Court under the *Trustee Relief Act.* It would be a lamentable doctrine if it were decided that a trustee cannot take the opinion of counsel.

[The VICE-CHANCELLOR:—The case is a plain one. The Defendant would have been perfectly justified in paying the funds into Court under the Act.]

It is submitted that the trustee would not have acted with common decency if he had, before seeking advice, paid the funds in under the Act. This trustee has acted honestly. His only wish was that the funds should go to the right person, and it would be a serious matter if the Court should punish such a trustee. If a trustee pays funds into Court without sufficient cause, he is made

(1) Law Rep. 1 Eq. 561. (2) Law Rep. 2 Eq. 177.
(3) Law Rep. 1 Ir. Eq. 110; Law Rep. 4 H. L. 288.

to pay the costs incident thereto. The Defendant acted in perfect good faith, and did, as he desired to do, his duty.

SIR JOHN STUART, V.C.:—

The only question is as to the costs of this suit. Under the *Trustee Relief Act* any trustee who entertains a reasonable doubt or difficulty as to whether the person claiming to be his *cestui que trust* is entitled to the funds, is authorized to pay the funds into Court. There are cases in which trustees have, without any reasonable doubt or difficulty, paid funds into Court under the Act, and they have been ordered to pay the costs. As to the meaning of the word "sole" in this will: either it created a difficulty or it did not. If it did not, the funds should have been paid to the claimant. If it did create a reasonable doubt or difficulty, they should have been paid in under the Act. Considering that the Defendant, in consequence of the course which he pursued, and in not taking advantage of the Act, caused the institution of this suit, he must pay the costs of it; but inasmuch as he would, if he had paid the funds into Court, have been entitled to his costs, charges, and expenses of so doing, and of his appearance on the Petition, he must be allowed such costs, and I shall order them to be deducted from the costs of the suit. The moneys must be paid and transferred as prayed.

Solicitors for the Plaintiffs: Messrs. *Dobinson & Geare*, agents for Mr. *F. Bowker, Winchester.*

Solicitors for the Defendant: Messrs. *Dyne & Harvey*, agents for Mr. *J. F. Adams, Alresford, Hants.*

V.-C. S.
1870
July 26.

LEWIS *v.* ALLENBY.

Will—Mortmain Act (9 *Geo.* 2, *c.* 36)—*Discretion of Trustees—Gift of Residue among such Charities as Trustees should think proper.*

Bequest of residue of personal estate (which included impure personalty) to trustees, upon trust to divide the same among such charities in *England* "as they in their sole and uncontrolled discretion shall think proper":—

Held, equivalent (as to the impure personalty) to a gift to charities exempt from the *Mortmain Act*, to be selected by the trustees, and therefore a valid gift.

EVERITT ALLENBY, by his will, dated the 30th of July, 1866, after giving pecuniary legacies to several persons, bequeathed legacies to several charities, to be paid out of such parts of his personal estate as might by law be bequeathed for charitable purposes. He then made several dispositions immaterial to the present question, and bequeathed the residue among certain persons named. By a codicil to his will, dated the 25th of July, 1868, he made (omitting irrelevant passages) the following disposition:—

"I give and bequeath to *Arthur James Lewis* and *Stephen William Lewis*, both of *Regent Street*, all the rest and residue of my personal estate and effects, after payment thereout of all the legacies I have charged thereon, upon trust to get in and realize the same, and pay and divide the proceeds of such realization, in such parts, shares, and proportions, and in such manner and form, and amongst any hospitals or other charitable institutions situate in *London* or elsewhere in *England*, and whether the proposed objects of their bounty shall have been instituted for similar or different purposes, as they in their sole and uncontrolled discretion shall think proper. I revoke the appointment of *John Haddon* as trustee and executor of my will, and I appoint the above-mentioned *Stephen William Lewis* as a trustee and executor in his stead, in addition to my brother *John Allenby* and *Arthur James Lewis*, appointed by my will; and I confirm my will dated the 30th day of July, 1866, in every respect where it is not altered by this codicil thereto."

The testator died on the 26th of July, 1868, and the will was duly proved by the executors. On the 16th of November, 1868, this bill was filed to administer his estate, and on the 17th of March, 1869, a decree was made for the administration of his estate, and the usual inquiries directed. On the 16th of July, 1870, the Chief Clerk made his certificate, by which he found that, besides pure personal estate, and money secured on mortgage, there were railway debentures of the estimated value of £6086 3*s.* 3*d.*

The case now came on for further consideration.

Mr. *Karslake*, Q.C., and Mr. *Dickins*, for the trustees, said that, as there were numerous charities exempted from the operation of the Statute of Mortmain, the trustees proposed to apply the impure personal estate in satisfaction of those legacies.

Mr. *Greene*, Q.C., and Mr. *Nalder*, for the heir-at-law.

Mr. *Wickens*, for the Attorney-General.

Mr. *Hughes*, Q.C., and Mr. *Hemming*, for a residuary legatee:—

It is not competent for the trustees to pick out certain charities which are not subject to the *Mortmain Act*, and apply the impure personalty in satisfaction of the legacies to those charities. What they are bound to shew is that the testator intended such application. Where there is merely a general option, trustees are not at liberty, by some course of proceeding not contemplated by the testator, to prevent the gift failing by reason of the *Mortmain Act*.

Thus, where money is given to establish a school, and it would in the ordinary course be necessary to acquire land, which would bring the case within the *Mortmain Act*, it is not competent for the trustees to effect the object in some other way, unless such was the testator's intention. It is not enough to say that the course proposed is not inconsistent with the testator's intention; it must be shewn to have been within his contemplation.

There are multitudes of cases where it would have been possible to perform the trust without infringing the Statute, but where the gift has nevertheless been held bad, because it could not be inferred that such a mode of performing the trusts was what the testator contemplated.

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A bequest towards building almshouses was held, *primâ facie*, a bequest for buying land and building on it, and therefore void, as the onus of shewing that the intention of the testator was restrained within lawful limits lies upon the party seeking to take the bequest out of the Statute: *Giblett* v. *Hobson* (1). The bequest in its substance, if not in its form, must exclude the unlawful act: *Mather* v. *Scott* (2). In *Attorney-General* v. *Hodgson* (3), a bequest for the establishment of a charity, if the same could be done, for twenty-seven poor old men, was held to be wholly void, though, no doubt, it might have been done without infringing the *Mortmain Act*, but not by means pointed out by the testator, and the whole gift therefore failed. In *Longstaff* v. *Rennison* (4) the testatrix directed the residue of her estate to be applied towards establishing a school in connection with a chapel, and to pay the same over to the treasurer of such school, now or hereafter to be built, and that was held bad. In the present case the testator clearly does not point at a discretion to be exercised by the choice of charities not within the Statute. The discretion is given, and the trustees must exercise it without reference to the Statute; and the gift is therefore void.

Mr. *Riddell*, for next of kin, submitted that, as the testator had directed in the will the gift to the charities should be made good out of such parts of his property as were legally applicable to such purposes, a like construction must be given to the codicil.

SIR JOHN STUART, V.C.:—

This is an entirely new question, but it is not attended with any serious difficulty. In *Grimmett* v. *Grimmett* (5), following his own decision in *Sorresby* v. *Hollins* (6), Lord *Hardwicke* said: "If a devise is in the disjunctive, and leaves the executors to two methods to do a particular thing by, the one lawful and the other prohibited by law, can any Court say, because one method is unlawful, that therefore the other is so too, and the whole bequest void? No; for if one method is lawful, that shall

(1) 3 My. & K. 517, 530.
(2) 2 Keen, 172.
(3) 15 Sim. 146.
(4) 1 Drew. 28.
(5) Amb. 210.
(6) 9 Mod. 221.

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be pursued and take effect." In this case the testator has given to his trustees power to name the charities that shall receive benefit under his will. Suppose the whole personal estate were impure personal estate, and the trustees were to name charities which were subject to the operation of the *Mortmain Act*, they would in such case be exercising their power in favour of charities which are not proper objects of the power, and it would be of no effect. This power can only be properly exercised as to the impure personalty in favour of such charities as are exempted from the *Law of Mortmain*, and all other charities are excluded as not objects of the power.

If, indeed, the trustees were to select some charities within the *Mortmain Act*, that would be good so far as the pure personalty is concerned, and a question of marshalling might possibly arise. But no such question has been suggested, or is likely to be raised. There must, therefore, be a direction that the trustees submit to me, at Chambers, the names of the charities proposed by them to be benefited.

Solicitors for the Plaintiffs and several of the Defendants: Messrs. *Bell & Newman.*

Solicitors for the Heir-at-law: Messrs. *Hicks & Son.*

Solicitors for the Attorney-General: Messrs. *Raven & Bradley.*

In re SPITALFIELDS SCHOOLS, AND COMMISSIONERS OF WOODS AND FORESTS.

V.-C. S. 1870 *April* 29.

Compulsory Purchase—Costs—3 & 4 *Vict. c.* 87, *s.* 49.

An express power contained in an Act of Parliament to award certain specified costs:—

Held, not to exclude the inherent jurisdiction of the Court of Chancery over the costs of proceedings authorized by the Act.

BY the 3 & 4 Vict. c. 87, the Commissioners of Woods and Forests were empowered to take, among other property specified in the schedule thereto, the parochial charity schools of *Spitalfields*, for the purpose of making additional thoroughfares in the metropolis. By the 49th section of the Act it was provided, that

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where, by reason of any disability or incapacity of the vendors entitled to any buildings or land to be purchased, the purchase-money for the same should be required to be paid into the bank, to be applied in the purchase of other lands to be settled to the like uses, it should be lawful for the said Court [Exchequer] to order the expenses of all purchases from time to time to be made in pursuance of that Act, or so much of such expenses as the said Court should deem reasonable, to be paid by the said Commissioners, who should from time to time pay such sum or sums of money out of the moneys applicable to the purposes of that Act as the Court should direct.

By the 9 & 10 Vict. c. 34, s. 18, being an Act authorizing the Commissioners to construct a new street from *Spitalfields* to *Shoreditch*, all the powers and provisions of the 3 & 4 Vict. c. 87, applicable to the properties specified in the schedule to that Act, were extended to the 9 & 10 Vict. c. 34.

The Commissioners having determined to take the schools under the powers of the Acts, the value was assessed at the sum of £1566, and that amount was accordingly paid into the bank to the credit of the Commissioners.

On the 24th of April, 1852, on a Petition presented by the trustees of the charity, Vice-Chancellor Sir *James Parker* ordered the trustees' costs, charges, and expenses of the purchase or taking of the lands to be taxed, and paid out of the purchase-money, and that the residue should be laid out in the purchase of Three per Cents.; that the interest, when invested, should be paid to the treasurer of the schools; and that the Commissioners should pay the Petitioners their costs of the investment, and of obtaining that order, and of all proceedings relating thereto, except such costs (if any) as were occasioned by litigation between adverse claimants.

The trustees now presented this Petition, praying that the fund, now consisting of £1513 6*s.* 10*d.* consols, might be transferred to them, or might be sold, and the proceeds paid to them, for the purpose of being applied by them in the erection of new schools, and asking that the Commissioners might pay the costs of the proceedings.

The Petition was served on the Commissioners, and also upon Mr. *Reynolds*, the vicar of *St. Stephen's, Spitalfields*, who claimed

for his district an interest in the fund, but which claim was disallowed by the Court.

Mr. *Karslake*, Q.C., and Mr. *Rasch*, submitted that the principle on which the Court construed these Acts as to costs had been well laid down by Vice-Chancellor *Kindersley* in the case of *Ex parte Vicar of St. Sepulchre's* (1). The Vice-Chancellor said: "The abstract justice of the case is, that where individuals are liable to have their property taken for public purposes, it must be presumed that they are entitled to be paid all expenses which are entailed upon them by such taking, otherwise the greatest injustice might be done." The learned Judge had previously acted on the same principle in *In re Cherry's Settled Estates* (2), and adhered to his view, notwithstanding the Court, on appeal, varied his order.

Mr. *W. W. Karslake*, for the Commissioners, submitted that the jurisdiction of the Court as to costs of proceedings under this Act was limited to the powers which the Act gave. The principle on which the Court construed these Acts was settled by Lord *Westbury* in *In re Cherry's Settled Estates* (3), in which he reversed the decision of Vice-Chancellor *Kindersley*. The principle of that decision was, that by the 18th section of the 9 & 10 Vict. c. 34, the *Lands Clauses Consolidation Act* was excluded, and must also be excluded from the 3 & 4 Vict. c. 87, which was incorporated in the 9 & 10 Vict. c. 34, by the 18th section of the latter Act. Lord *Westbury*, in *Ex parte Vicar of St. Sepulchre's* (4), explained his decision in *In re Cherry's Settled Estates*. The order of Vice-Chancellor *Parker*, directing payment by the Commissioners of the costs of a Petition to invest the funds, might be explained as being a "purchase," and so within the 49th section of the 3 & 4 Vict. c. 87. The Court, however, had no jurisdiction, under this Act, to order the vendor's costs, in making out the title to property taken by the Commissioners, to be paid by them: *In re Strachan's Estate* (5).

Mr. *Humphry*, for *Reynolds*, the Vicar of *St. Stephen's*, whose

(1) 32 L. J. (Ch.) 463.
(2) 31 Ibid. 38.
(3) 31 L. J. (Ch.) 351.
(4) 33 Ibid. 372.
(5) 9 Hare, 185.

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claim to share in the fund had been disallowed, asked for his costs.

Sir John Stuart, V.C.:—

I think the order of Vice-Chancellor *Parker*, made under the 3 & 4 Vict. c. 87, is founded on the true principle of construction.

By the 49th section of the Act it is enacted, that it shall be lawful for the Court to order the expenses of all purchases from time to time to be made in pursuance of the Act, or so much of such expenses as the Court should deem reasonable, to be paid by the Commissioners. The jurisdiction of this Court as to costs is not interfered with by this section further than as to the costs of purchases. It is not a legitimate inference, that because Parliament has said that the Commissioners shall pay the costs of purchases, and is silent as to the payment of other costs, the inherent jurisdiction of this Court as to costs is taken away, so that it cannot order the payment of any costs except the costs of purchases. In my opinion, this Court has jurisdiction as to all the costs of these proceedings, and ought to exercise it. It is said that *Reynolds'* costs are the costs of adverse litigation. It does not seem that they are; but I shall order that the Commissioners pay the costs, such costs not to include the costs of adverse litigation.

Solicitors for the Petitioners: Messrs. *Tanqueray-Willaume & Co.*

Solicitors for the Commissioners: *The Solicitors for Her Majesty's Commissioners of Woods and Forests.*

Solicitor for Mr. *Reynolds:* Mr. *Whittington*

In re BANK OF HINDUSTAN, CHINA, AND JAPAN.

SWAN'S CASE.

V.-C. S.
1870
July 7.

Companies Act, 1862, *s.* 115—*Practice—Examination of Witnesses.*

The sister and nephew of an indebted contributory were summoned before the Examiner, and declined to answer:—

Held, that they were bound to answer, although there were no facts proved, except the relationship, to connect them with the contributory or the company.

SARAH MARGARET SWAN, of 59, *Nelson Square, Blackfriars Road*, spinster, was the registered holder of 150 shares in the *Bank of Hindustan, China, and Japan, Limited*, and *Mary Higgs Swan* was the holder of 100 shares in the same bank. These shares were acquired by transfers, between February and August, 1866, and no calls had been paid since the transfers. The sum of nearly £3000 for calls and interest was due. Some difficulty arose in tracing these ladies, they having left their registered addresses three or four years ago. In August, 1869, it was discovered that they were residing with their brother, *Edgar Swan*, at 13, *Dorset Terrace, Clapham Road*, and *Mary Higgs Swan* was, at that address, served with a balance-order for the amount due on her shares, and an attachment was afterwards issued and lodged with the sheriff; but every effort made to arrest her failed.

Sarah Margaret Swan acquired her 150 shares in February, 1866, in consideration of £2250. In April, 1866, she transferred them to *Edgar Swan* for a consideration of 5*s.*, and on the 11th of June, 1866, he re-transferred them to *S. M. Swan* for the same consideration. A summons was, in January, 1870, issued for *Edgar Swan's* examination, but it could not be served upon him. Summonses were afterwards issued against, and served upon, *Agnes Pool* and *Edgar Swan*, junior, a sister and nephew of the contributories, for their examination, and they attended before *Charles Beavan*, Esq., on the 28th of June, 1870, and at that time,

Edgar Swan, after being sworn, was asked by the counsel for the bank the following question:—

"Are you not related to *Sarah Margaret Swan*, formerly of 59, *Nelson Square, Blackfriars Road*, spinster?" and he replied thus:

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"Upon the advice of my counsel I decline to answer this question, or any other question relating to Miss *Swan*;" and *Agnes Pool*, after being sworn, was asked this question: "Was not *Sarah Margaret Swan*, formerly of 59, *Nelson Square, Blackfriars Road*, spinster, your sister?" and the reply was: "Upon the advice of my counsel I decline to answer this question, or any other question in relation to Miss *Swan*."

This was a motion on the part of the bank that *Agnes Pool*, of *Holland Street, Brixton Road, Surrey*, widow, and *Edgar Swan*, of 70, *Fenchurch Street*, articled clerk, who attended on the 28th of June, 1870, before *Charles Beavan*, Esq., one of the Examiners of the Court, and were sworn, but demurred or objected to answer the questions then and there put to them on the part of the bank in these matters, might be ordered to attend, at their own expense, before the said Examiner, at such time and place as he should appoint, to be examined in these matters; and that the said *Agnes Pool* and *Edgar Swan* might respectively be ordered then and there to answer the said questions which they demurred or objected to answer on the 28th of June, 1870, and that they might be ordered to pay the costs of and occasioned by their said demurrer or objection, and the costs of this application.

Mr. *Greene*, Q.C., and Mr. *Ince*, for the motion, referred to the statute 25 & 26 Vict. c. 89, s. 115, and *In re Mercantile Credit Association, Clement's Case* (1), *In re Financial Insurance Company, Bloxam's Case* (2); and submitted that, as both *A. Pool* and *E. Swan* could give information as to what property the contributories had in this country, and which was an asset of the company, they were bound to answer the questions put to them. They also stated that in a subsequent case, the Master of the Rolls, following *Clement's Case* and *Bloxam's Case*, had made an order against a witness who had refused to answer any question as to his brother's affairs, who was a contributory of the company. That case was on all fours with the present, and therefore these witnesses ought to be ordered to answer the questions which they had refused to answer, the law being, that a debt due to a company upon shares was an asset in respect of which liquidators were justified in

(1) 37 L. J. (Ch.) 295. (2) 36 L. J. (Ch.) 687.

examining any person capable of giving information which might tend to enable them to recover such asset.

Mr. *Dickinson*, Q.C., and Mr. *E. C. Willis*, for the witnesses:—

There is no evidence to shew that either Mrs. *Pool* or *Edgar Swan* have any knowledge of what means Miss *S. M. Swan* possessed; but all questions put ought to be in reference to the trade, effects, and dealings of the company, and there is no evidence to shew that these witnesses know anything about them. *Edgar Swan*, junior, was not the person with whom Miss *S. M. Swan* was residing when served with a balance-order. The question really is, whether any friend of a contributory is bound to answer any questions which may enable a liquidator to find out his or her address. The cases cited are not in point, particularly *Bloxam's Case* (1), where, he being a clerk at the bank, there was something upon which the liquidator could proceed. In this case the Court cannot make any order, and certainly not in the terms of the motion.

SIR JOHN STUART, V.C.:—

Bloxam's Case, and *Clement's Case* (2) were decided upon a principle which seems to me to be quite sound, and perfectly intelligible. The money sought to be recovered upon the balance order is money belonging to the company, and any person who possesses any means of information which may enable the liquidator to recover the company's money may be examined. These witnesses—the sister and nephew of the contributories—have refused to answer any questions relating to them; that is to say, they have refused to give information relating to the recovery of money due on a balance-order. There must be an order against them, but not in the terms of the notice of motion. The order will be, that these witnesses attend at their own expense before the Examiner, at such time and place as he shall appoint, and that they pay the costs of this application.

Solicitors: Messrs. *Ashurst, Morris, & Co*; Mr. *T. W. Rogers*.

(1) 36 L. J. (Ch.) 687. (2) 37 L. J. (Ch.) 295.

V.-C. S.
1870
July 21.

CROOK *v.* CORPORATION OF SEAFORD.

Corporation—Agreement not under Seal—Standing by—Acquiescence—Specific Performance.

A municipal corporation passed a resolution in January, 1860, agreeing to let land to *C.* for 300 years, to be stumped out by a committee and himself at his expense. The corporation did not stump out the land, and *C.* afterwards stumped out the land himself, took possession of it, erected a terrace on the land, and paid rent to the corporation:—

Held, that *C.* was entitled to a decree for specific performance, the corporation having acquiesced in all that he had done:

Held, further, that the right of the corporation to grant such a lease could not be disputed in this suit.

Affd subject to variation 6 Ch 551 L. C.

THE Corporation of *Seaford* was created by charter in the reign of King *Henry* VIII. by the title of "The Bailiff and Commonalty of the Town, Parish, and Borough of *Seaford*;" and it was not included within the provisions of the *Municipal Corporations Act*, 1835.

The Defendants the corporation were the owners of lands situate at *Seaford*, now vested in the other Defendants as feoffees in trust for the corporation. The Plaintiff was also the owner in fee of lands situate in *Seaford*. Dr. *Tyler Smith* was also the owner of lands in the borough of *Seaford*. The Plaintiff and Dr. *Tyler Smith* were desirous for the improvement of their properties, and they handed to the corporation for their consideration a plan of an intended terrace to be made by them, and suggested that the corporation should demise the lands, at that time waste, for a term of 300 years, at a nominal rent. On the 5th of January, 1860, a general court of assembly of the corporation was holden, and the following are the minutes extracted from the books of the corporation:—

"Proposed lease to Mr. *Thomas Crook*." A resolution was then proposed and carried "That this corporation will agree to let on the following terms, viz.: 1. The frontage of *West Gun Field*, in *Seaford*" [the Plaintiff's land], "with the flat part of the beach opposite (to be stumped out at the expense of Mr. *Crook*), but the coach or main highroad between to be preserved at its present width at the

least; also part of the *West Laine* at the back of the said field to be stumped out at the expense of Mr. *Crook*. 2. Mr. *Crook* to make and build a neat concrete terrace in front of his field (as shewn in his plan) at his own expense, the said terrace to be completed by ————, and to be left open as a public walk for the use of foot-passengers at all times. 3. The corporation to grant a lease for 300 years to Mr. *Crook* at 10*s.* per annum; Mr. *Crook* to pay the whole expense, and all legal charges and costs whatever for the said lease and plan for the same, and also for the counterpart for the corporation, and every expense attending the execution thereof. 4. The town clerk to prepare the lease on application of Mr. *Crook*. 5. The hiring to commence from the 14th day of February, 1860. 6. No building (except the said public terrace) to be erected on the land or flat of the beach. These terms are offered without prejudice, and upon condition that the consent of the feoffees in trust can be obtained; but if the feoffees in trust, or any of them, shall refuse to concur in this arrangement, any expense occasioned by such refusal shall be wholly borne by the proposed lessee. That the following persons" [who were named] "be appointed a committee to arrange the stumping with Mr. *Crook*, and to settle any minor details."

A copy of these minutes was sent to the Plaintiff, and he accepted the terms offered. The Plaintiff stumped out the pieces of corporation land, and after the same were so stumped out he entered into possession of them; and, from the 14th of February, 1860, to 1865, in pursuance of the agreement, duly paid the rent of 10*s.* per annum to the corporation, and received receipts in respect thereof.

The Plaintiff, upon the faith of the agreement, erected a sea-wall about 700 feet long (averaging ten feet high and three feet thick), and, in February, 1861, completed a concrete terrace in accordance with the plan submitted to the corporation, and referred to in the minutes. The terrace had been left open as a public walk, as stipulated for by the minutes, and the public had enjoyed the same. During the progress of the works the bailiff and other members of the corporation visited the same in the presence of the Plaintiff, who then and there pointed out and explained to them the nature of the works; and the Plaintiff was allowed by the

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corporation to complete the works without any objection on their part.

The Plaintiff, on the 30th of July, 1864, received from the bailiff, on behalf of the corporation, a notice to quit and deliver up to him the possession of the frontage land which he held as tenant to the corporation. On the 7th of September, 1864, the solicitors of the Plaintiff requested the town clerk to send a draft of the proposed lease for perusal. On the 31st of January, 1865, the town clerk, in a letter, stated to the solicitors of the Plaintiff that he had not adhered to the terms upon which it was originally proposed that the corporation should grant a lease; that the corporation had resolved that he was not entitled to such a lease, and that they could not consent to his having one. The town clerk also stated that he was authorized to say that the corporation was open to a negotiation with Mr. *Crook* with a view to allowing him to retain the land in question upon such terms as might be considered fair and equitable. Considerable correspondence passed between the solicitors of the parties, repeated applications for a lease in accordance with the terms of the minutes being refused.

On the 25th of October, 1869, the corporation issued a summons in ejectment from the *Sussex* County Court, returnable on the 7th of December, 1869.

On the 10th of November, 1869, this bill was filed, praying that the several provisions contained in the minutes of the 5th of January, 1860, might be ordered to be specifically performed by the corporation, and that the corporation, and all other necessary parties, might be ordered to execute to the Plaintiff a proper lease in accordance with the minutes; and for an injunction to restrain the proceedings in ejectment; and that if for any reason the specific performance should be refused, the Defendants the corporation might be decreed to pay to the Plaintiff such damages, and to be assessed in such manner, as the Court should direct; and for costs.

The evidence on the part of the Defendants was to the effect, that at the meeting of the committee to stump out the land the Plaintiff insisted that he was entitled to take the whole of the land of which he stated he had now taken possession; that that was objected to as not being included in the agreement; that the

committee did not, in consequence of such objection, stump out the land, and that the Plaintiff had encroached on the corporation land.

Mr. *Dickinson*, Q.C. (Mr. *Pontifex* with him), for the Plaintiff, stated the facts, and was stopped by the Court.

Mr. *Greene*, Q.C., and Mr. *Waller*, for the Defendants:—

No corporation can be bound but by a contract under its seal, and therefore the Defendants were not bound by these minutes. The contract must be such an one as an action at law can be brought for damages, and there being no contract which is binding at law this Court will not decree specific performance. There never was a completed contract which this Court could order to be performed, and therefore the suit was misconceived, being founded upon an imperfect and uncertain contract. Further, *Seaford* is a borough within the provisions of the statute 5 & 6 Will. 4, c. 76, and by sect. 93 the corporation is prevented from demising land for a longer period than twenty-one years. It was intended that the Defendants should stump out the land, but the Plaintiff did it, and he has included within his stumps land which was intended for the public use; and having regard to all these facts, and to the lapse of time since the minutes were entered in the corporation books, and no proceedings taken on the part of the Plaintiff, this bill ought to be dismissed with costs.

[They referred to *Eads* v. *Williams* (1); *Fry* on Specific Performance (2), and cases there cited.]

SIR JOHN STUART, V.C.:—

The argument on the part of the Defendants that the minutes which constitute the agreement are not under the seal of the corporation, and are therefore not binding, seems to me to be wholly untenable. This case depends upon the acts and conduct of the parties. It has been contended that the agreement is in its terms not sufficiently certain to justify the Court in decreeing specific performance. But when coupled with the plan which was exhibited when the agreement was come to, it seems to me that

(1) 4 D. M. & G. 674, 691. (2) Page 325.

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the agreement is sufficiently certain. It has also been contended that it was of the essence of the agreement that the land should be stumped out by the Defendants. The process of stumping out was to be performed by the Defendants, at the expense of the Plaintiff; and if, after the question arose between the committee, which was appointed to arrange the stumping out, and the Plaintiff, who was dissatisfied with their proceedings, the Defendants had taken proceedings against the Plaintiff in reference to his stumping out the land himself, a very different case might have been made. But all these things were done and completed in 1860, for it is admitted that the Plaintiff took possession of the land, and arranged the stumping out in his own way, the Defendants knowing what was done, and the terrace was completed in February, 1861. During all the time that the Plaintiff was going on with his works the Defendants took no proceedings, but, on the contrary, they acquiesced in what the Plaintiff was doing, and in part for the benefit of the public. The Plaintiff, by the course which he took, made the agreement perfectly certain, and I cannot, in 1870, in reference to what the Plaintiff did in 1860 with the knowledge of the Defendants, say that they shall be at liberty to eject him, and that he is to forfeit all the money which he has expended upon the land and terrace. The argument in reference to the length of time before the Plaintiff came to this Court seems to me to establish his case, and in my opinion he is entitled to a decree for specific performance.

As to the question whether the corporation can grant a lease for so long a period, that, in my opinion, cannot be raised in this suit.

MINUTES:—Declare, that the Plaintiff is entitled to specific performance of the agreement contained in the proposal made by the Defendants the corporation in January, 1860, and decree the same accordingly; and order that the Defendants do make and execute a lease to the Plaintiff of all the land which has been in the occupation and possession of the Plaintiff since 1860, as in the pleadings mentioned.

Liberty to the Plaintiff and the Defendants to apply at Chambers as they may be advised in reference to the performance of the agreement, and the Plaintiff's costs of the suit to be paid by the Defendants.

Solicitors: Mr. *George Brown;* Messrs. *Palmer, Palmer, & Bull,* agents for Messrs. *Gell & Woolley, Lewes.*

HARES *v.* LEA.

V.-C. S.
1870
July 23.

County Court—Jurisdiction—Transfer—Order of County Court to pay Costs after Transfer discharged.

After an order by a County Court to transfer a cause to the Court of Chancery, the jurisdiction of the County Court is gone, and an order by it that the Plaintiff should pay costs was discharged without prejudice to any order the Court of Chancery might make as to the costs.

THE Plaintiffs filed their plaint in the County Court of *Shropshire* to recover £160 and interest from the estate of *James Lea*, deceased. There was no allegation in the plaint that the estate of *James Lea* did not exceed £500 in value, and the evidence of the Defendant proved that it exceeded that amount, and when the plaint came on to be heard, the County Court Judge (*Josiah Smith*, Esq., Q.C.) ordered it to be transferred to the Court of Chancery, and also ordered the Plaintiffs to pay to the Defendant the sum of £25 9*s.* for his costs of the suit.

This was a motion that so much of the order which related to costs might be discharged.

Mr. *Phear*, for the Plaintiffs:—

The order made for the payment of costs was beyond the jurisdiction of the County Court Judge. If the plaint had not been transferred to this Court the Plaintiffs could not have brought the question before this Court, as they now do, by way of appeal motion, but they would have proceeded against the County Court by way of prohibition. They could not, however, now do that, because of the transfer. The plaint being before this Court, which has absolute control over it, the proper course will be to discharge that part of the order which directs costs to be paid to the Defendant. The statute 28 & 29 Vict. c. 99, does not give a right of appeal in respect of costs only. The 18th section enacts that if any party in a suit under that Act shall be dissatisfied with the direction of a Judge of a County Court on any matter of law or equity, such party may appeal in the special mode pointed out by the Act; but a direction as to the payment of costs is a matter

V.-C. S. 1870 HARES v. LEA.

neither of law nor equity, and therefore the Plaintiffs have no other means of bringing the matter before this Court than by a motion by way of appeal. This Court has full power to make the order now asked.

Mr. *Horsey*, for the Defendant:—

This Court has no jurisdiction over the orders of the County Courts, except by virtue of the Act (28 & 29 Vict. c. 99). There is no jurisdiction to overrule such orders, except in the mode pointed out by the Act. This order is valid. This application is virtually an appeal only against an order for the payment of costs, and it is well settled that there can be no such appeal. On the merits the motion ought to be refused, for the Plaintiffs knew that the County Court had no jurisdiction in the matter, and yet they filed their plaint in that Court; and the Judge was right in ordering them to pay costs to the Defendant.

SIR JOHN STUART, V.C.:—

That part of the order which directs the payment of costs was a mistake, the whole subject matter of the plaint having been ordered to be transferred to this Court. It has been accordingly transferred to this Court. After this transfer the jurisdiction of the County Court was gone, and in my opinion it was wrong to order payment of costs. That order must be discharged, but without prejudice to any order that this Court may make hereafter as to these costs.

Solicitors: Messrs. *Pownall, Son, Cross, & Knott*, agents for Mr. *Lucas, Wem, Salop*; Mr. *H. G. Field*.

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ACCEPTANCE OF SHARES—*Contributory—No Notice of Allotment—Execution of Transfer in Blank.*] At the instance of the promoters of a limited company, and as he was told *pro formâ*, *W.* signed an application for 200 shares, and at the same time executed a blank transfer. He paid nothing, never executed the articles of association, received no notice of allotment, and heard nothing about the company till he received notice from the liquidator, appointing a day to settle the list of past members:—*Held*, that he was entitled to be taken off the list, though it appeared that the shares had been, in fact, allotted to him, that deposits and calls had been paid on them by some persons without his knowledge, and that, by the transfer executed by him in blank, and subsequently filled up, the shares had been transferred to one of the promoters. *In re* BRITISH AND AMERICAN STEAM NAVIGATION COMPANY. WARD'S CASE - - - - - - 659

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ANNULLING REGISTRATION—*Bankruptcy Act*, 1861, *ss.* 192, 198—*Deed of Arrangement—Unreasonable Amount of Composition—Laches.*] A creditors' deed, under the 192nd section of the *Bankruptcy Act*, 1861, may be impeached for inadequacy of composition importing fraud.—Such a deed, when registered, is in the nature of a record, and the Court has power to order the registration to be vacated.—Mere delay in applying to set aside a creditors' deed for fraud, is in itself no ground for refusing such an application, if the position of the parties be not altered.—*Ex parte Savin* (Law Rep. 1 Ch. 616) distinguished. *Ex parte* Williams. *In re* Pullen - - 57

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APPLICATION OF RATES—*Improvement Commissioners—Costs of Promotion of Bill in Parliament—Injunction*] By a Local Improvement Act, passed in 1854, Commissioners were incorporated, and a district was defined; and the Commissioners were empowered to cause to be paved, drained, and otherwise improved, the town and township comprised in the district, and to be the surveyors of highways within the same, and keep the same in repair; to "do all acts, matters, and things for promoting the health, comfort, and convenience of the inhabitants" of the district, which they might deem or consider necessary, and "for that purpose" to "exercise all the powers vested in them" by the Act and the Acts incorporated therewith, amongst which were the *Companies Clauses Act*, and parts of the *Towns Improvement Clauses Act*, 1847.—The Court granted an injunction to restrain the Commissioners from applying any moneys produced by rates towards the promotion of a bill in Parliament the object of which was to obtain an extension of their district. Attorney-General *v.* West Hartlepool Improvement Commissioners - - - - 152

APPOINTMENT BY WILL—*Destination of Property ineffectually appointed.*] *C.*, by his will, bequeathed a leasehold estate called *S. H.*, after the death of his wife, upon the same trusts as his wife should declare with respect to the disposition of her residuary personal estate by her will; and in default of any disposition by his wife of her residuary personal estate, or so far as the same (if any) should not extend, upon other trusts.—*C.*'s wife survived him, and by her will gave to *S.* and *R.*, whom she appointed her executors, "all her property and estate known as *S. H.*," in trust for *T.* for life; and gave all her real and personal estate to *S.* and *R.* upon trust for conversion, and upon trust out of the proceeds to pay her debts, funeral and testamentary expenses, and legacies; and gave "the residue of her property," as to two thirds, for charitable purposes:—*Held*, that the *S. H.* estate was not by the will of the widow converted into her own estate, and that, subject to the life-interest of *T.*, two thirds of it went to the persons entitled under *C.*'s will in default of appointment. Bristow *v.* Skirrow - 1

APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN—*Lands Clauses Act, s.* 74—*Leaseholds under Dean and Chapter—Renewal Fund—Trustees—Ecclesiastical Commissioners—*

APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN—*continued.*

Tenant for Life and Remainderman—Apportionment of Purchase-money—23 & 24 *Vict. c.* 124.] Leaseholds under a Dean and Chapter, renewable by custom, were held by trustees upon trust for a tenant for life, with remainder over; and the trustees were directed, "two years or sooner before the time for renewal," to bring a part of the rental into a fund until a sufficient sum was raised for the renewal, "so that the estates may be always kept renewed . . . for ever." In June, 1865, and February, 1866, notices to treat for parts of the leaseholds, then having about thirteen and five years respectively to run, were given by a railway company. At Lady Day, 1866, the Dean and Chapter ceased to renew leases; and about the same date their property was taken over by the Ecclesiastical Commissioners.—The values of the two properties having been assessed at amounts which, when paid, and invested in £3 per Cent. stock, gave a diminished income to the tenant for life:—*Held*, that the tenant for life was not entitled to be recouped the deficiency of income out of the *corpus* of the fund.—*Morres* v. *Hodges* (27 Beav. 625) and *Tardiff* v. *Robinson* (27 Beav. 629, n.) considered and distinguished. *In re* Wood's Estate - - - 572

APPORTIONMENT WHEN NO DEATH—*Change of Interest without Death or Determination*—4 & 5 *Will.* 4, *c.* 22, *s.* 2.] A settlor, by deed, assigned securities to trustees upon trust after his, the settlor's death, during the minority of *A.* to pay such portion of the income as they should think proper, for the maintenance and education of *A.*; and when *A.* should have attained the age of twenty-one, and thenceforth until he should attain thirty, by and out of the income to pay to *A.* such annual sum as they should in their discretion think proper, not exceeding £5000, and accumulate the unapplied portion, and stand possessed of the accumulations upon the trusts thereinafter declared concerning the fund; and upon further trust, when and so soon as *A.* should have attained thirty, to stand possessed of the funds and the annual produce thereof, "upon trust that they and he shall pay unto and permit" *A.* "and his assigns to receive and take the whole of the dividends, interest, and annual produce of the same, during his life, for his and their own use and benefit," with limitations over. Upon *A.* attaining thirty:—*Held*, that there must be an apportionment of the current dividends. Donaldson *v.* Donaldson - - - - 635

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ASSIGNMENT FOR BENEFIT OF CREDITORS—*Neglect of Creditor to sign—Accession by Acquiescence.*] A debtor executed an assignment to trustees for the benefit of his creditors in consideration of their covenanting not to take any proceedings against him for three years, and it

ASSIGNMENT FOR BENEFIT OF CREDITORS—*continued.*
was provided that those creditors who should not execute the deed within six months should be excluded from the benefits conferred thereby. One of the creditors neglected to sign the deed, but acquiesced in it, and took no proceedings against the debtor:—*Held*, that such creditor, having treated the deed as valid, and acquiesced in its provisions, was entitled to the benefits conferred by it. *In re* Baber's Trusts - 554

ASSIGNMENT OF DEBENTURE — *Company — Set-off—Lien—Assignment subject to Equities—Release of Equities—Course of Conduct.*] The assignee of a *chose in action* takes it subject to all equities available against the assignor; but the person entitled to such equities may release them, either expressly or by implication arising from his course of conduct.—The articles of association of a company provided that the company should have a primary lien on the debentures of any member of the company who might be either absolutely or contingently indebted to the company for any amount or on any account, and that the directors might, after any such debt became absolutely payable, sell and transfer any debentures of the member so indebted or liable. The holder of certain debentures, who was also a shareholder, transferred his debentures in August, 1865, and the transferees were registered as the proprietors of the debentures, and received certificates to that effect from the company. In 1866 and 1867 calls were made on the shares held by the transferor, which were unpaid. In December, 1867, the company fell into difficulties, and applied to the transferees of the debentures to renew them for a period of three years:—*Held*, that the company had precluded themselves by their conduct from setting up their lien for unpaid calls as against the transferees.—*Higgs* v. *Northern Assam Tea Company* (Law Rep. 4 Ex. 387) followed and approved. *In re* Northern Assam Tea Company. *Ex parte* Universal Life Assurance Company - - - - 458

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BILL OF SALE—*Bills of Sale Act* (17 & 18 *Vict. c.* 36)—*Assignee in Bankruptcy and Assignee under a Bill of Sale—Insufficiency of Description—Possession or apparent Possession.*] The object of the *Bills of Sale Act* (17 & 18 Vict. c. 36) is to give, by means of registration, information to all persons whom it may concern that a debtor, or a person about to contract debts, has executed a bill of sale and thereby deprived himself of a portion of his property. Therefore, where at the date of the execution and registration of the bill of sale, the assignor was lessee and manager of a

BILL OF SALE—*continued.*
theatre, and was described in such bill of sale simply as "Esquire":—*Held*, that the description was insufficient, and the bill of sale, notwithstanding registration, null and void against his assignee in bankruptcy.—A *bonâ fide* assignee for value under a bill of sale of household furniture and effects, immediately sent a person into the house to take and keep, and who took and kept, possession; but the assignor down to the date of his bankruptcy continued to live in the house and use the furniture as before:—*Held*, that the furniture and effects were in the possession or apparent possession of the bankrupt within the meaning of the *Bills of Sale Act*. *Ex parte* Hooman. *In re* Vining - - 63

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BORROWING POWERS—*Company—Directors—Power to charge Calls—Disposition of Property after Commencement of Winding-up—Unlimited Company—Insurance Company—Set-off of Debt against Calls—Companies Act*, 1862, *ss.* 101, 153.] The deed of settlement of an insurance company contained no express power of borrowing, but empowered the directors to do and execute all acts, deeds, and things necessary, or deemed by them proper or expedient, for carrying on the concerns and business of the company, and to do, enforce, perform, and execute all acts and things in relation to the company, and to bind the company, as if the same were done by the express assent of the whole body of members thereof:—*Held*, that the directors acted within their powers in borrowing money from the bankers of the company to meet pressing demands upon the company, and charging the proceeds of a call already made, but not immediately payable, with the repayment of the loan; and that two of the directors who had become sureties for the company, and had repaid the loan, were entitled to the benefit of the charge on the call.—Between the presentation of a petition to wind up an insurance company and the winding-up order, the directors, being in negotiation for the transfer of the company's business and liabilities to another company, and being pressed by the company's bankers for payment of their overdrawn account, passed a resolution giving the bankers a charge on the proceeds of calls made before the presentation of the petition, and gave their own promissory note for the amount of the debt, as sureties for the company:—*Held*, that the charge on the calls, having, under the circumstances, been given with the *bonâ fide* intention of preventing the ruin of the company, ought to be confirmed by the Court in the exercise of the discretion given to it by the *Companies Act*, 1862, s. 153; and that the directors, having paid the debt of the bankers, were entitled to a lien on the proceeds of the calls.—A shareholder in an unlimited company, which is being wound up by the Court, may be allowed to set-off a debt due to him from the company on an independent contract, against calls made on his shares under the winding-up, and this rule applies to an insurance company whose deed of settlement provides that the policies shall restrict the liability

BORROWING POWERS—*continued.*
of the shareholders to the amount of their shares of the subscribed capital of the company. *In re* International Life Assurance Society. Gibbs and West's Case - - - - 312

2. —— *Company—Call—Mortgage of future Calls.*] Under a power to "pledge, mortgage, or charge the works, hereditaments, plant, property, and effects of the company," in order to secure the repayment of moneys borrowed, the proceeds of a call already made, but not yet paid, may be charged, but not the proceeds of a future call. *In re* Sankey Brook Coal Company. (No. 2.) [381

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—— *Smith's Trusts, Re* (12 W. R. 933) followed
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CONFIRMATION OF SALES ACT—(25 & 26 *Vict. c.* 108)—*Practice—Service of Petition.*] A Petition under 25 & 26 Vict. c. 108, s. 2, by trustees of settled land with power of sale, exerciseable with the consent of the tenant for life, for leave to sell the land and minerals separately, need not be served on the beneficiaries entitled in remainder. *In re* Pryse's Estates - - 531
CONSERVATORS OF RIVER—*Navigable River—Nuisance—Conservancy—Right to abate Nuisance—Right to sue—Harbour, Docks, and Piers Clauses Act*, 1847 (10 *Vict. c.* 27), *s.* 12—*General Pier and Harbour Act*, 1861 (24 & 25 *Vict. c.* 45), *s.* 14—25 *Vict. c.* 19, *s.* 25.] By a public Act passed in the reign of *Henry* VIII. the corporation of the city of *Exeter* were empowered to remove obstructions to the navigation of the river *Exe*, paying compensation to the owners of the soil where the obstructions were situated:—*Held*, first, that this Act did not confer the conservancy of the river on the corporation; secondly, that it did not entitle the corporation to file a bill in equity to restrain the erection of a pier in the river; and, thirdly, that it did not confer any right or privilege on the corporation within the meaning of sect. 14 of the *General Pier and Harbour Act*, 1861, so as to prevent the erection of a pier in the river without their consent being obtained. Corporation of Exeter *v.* Earl of Devon 232

CONSOLIDATED ORDERS, Schedule I—Fees and charges of special examiner - 139
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CONTEMPT—Process of—Non-payment of costs—Debtors Act, 1869 - - - 53
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COSTS—Committal for non-payment of—Debtors Act, 1869 - - - - 53
See Committal under Debtors Act.

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—— Costs in the cause—Motion reserved to the hearing - - - - 557
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—— Lands Clauses Act - - - 612
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—— Mortgage suit—Puisne mortgagee - 447
See Costs in Mortgage Suit.

—— Payment out of Court—Matter transferred from Court of Exchequer - - 532
See Costs of Payment out of Court.

—— Petition to appoint additional trustee 45
See Costs out of Income.

—— Taxation of - - - - 165
See Taxation of Costs.

—— Trustees—Unnecessary suit - - 664
See Trustees' Costs.

COSTS IN MORTGAGE SUIT—*Puisne Incumbrance—Sale of Mortgaged Property.*] Where, at the instance of a mortgagee Plaintiff, a decree is

COSTS IN MORTGAGE SUIT—*continued.*
made for sale of the mortgaged property, and a puisne mortgagee concurs in a conveyance to a purchaser under the decree, such puisne incumbrancer is not entitled to any costs in respect of such concurrence unless the prior incumbrancer has been paid in full. Wonham *v.* Machin 447

COSTS IN THE CAUSE—*Motion ordered to stand over till the Hearing.*] In a suit to restrain the erection of a jetty in a river, a motion for an injunction was ordered to stand over till the hearing, and no direction was given as to costs. At the hearing a decree was made for a perpetual injunction, with costs, but the costs of the motion were not mentioned in the decree:—*Held*, that the costs of the motion were costs in the cause. Mounsey *v.* Earl of Lonsdale. Attorney-General *v.* Earl of Lonsdale - - 557

COSTS OF PAYMENT OUT OF COURT — *Compulsory Purchase of Land—Purchase-money paid into Court—Costs of Payment out of Court to Person absolutely entitled—Costs not provided for by Act.*] Under the compulsory powers of an Act of Parliament (7 Geo. 4, c. lvii.) a public body purchased part of a settled estate, and paid the purchase money into the Court of Exchequer. The Act provided that money so paid in should be reinvested in the purchase of land, and that the public body should pay the expenses of all purchases to be made in pursuance of the Act:—*Held*, that, although it was a matter transferred from the Court of Exchequer, the Court of Chancery had no power to order the public body to pay the costs of a Petition for the payment of the fund to persons who had become absolutely entitled to it. —*In re Metford* (6 Jur. (N.S.) 796), *In re Mouseley's Trusts* (4 K. & J. 86, n.), and *Ex parte Ecclesiastical Commissioners* (5 N. R. 483), followed.—*In re Robertson* (23 Beav. 433), and *In re Tiverton Market Act* (26 Beav. 239), not followed. *In re* Harrison's Estate - - - - 532

COSTS OUT OF INCOME—*Legacy — Tenant for Life and Remainderman—Sole Trustee—Appointment of Additional Trustee—Costs of Petition.*] Where a legacy had been bequeathed to a sole trustee upon trust for a tenant for life, and then for reversioners absolutely, the costs of a Petition by the reversioners for the appointment of an additional trustee were ordered to be paid by the Petitioners, and not out of the *corpus* of the legacy. *In re* Brackenbury's Trusts - 45

COSTS UNDER ACT OF PARLIAMENT—*Compulsory Purchase—Costs—3 & 4 Vict. c. 87, s. 49.*] An express power contained in an Act of Parliament to award certain specified costs:—*Held*, not to exclude the inherent jurisdiction of the Court of Chancery over the costs of proceedings authorized by the Act. *In re* Spitalfields Schools, and Commissioners of Woods and Forests 671

COSTS UNDER LANDS CLAUSES ACT—*Purchase-money—Interim Investment on Real Security — Costs.*] Upon an order for an interim investment on real security of purchase-money paid into Court under the *Lands Clauses Act*:—*Held*, that the costs of the interim investment must be paid by the company, but not the costs of any subsequent investment in land. *In re* Flemon's Trusts [612

CO-SURETIES—*Sureties by separate Instruments.*] A bond was executed by a principal and two sureties. One of the sureties compounded with his creditors, and by the terms of the bond the moneys secured became immediately payable. After this the Plaintiff entered into a separate bond to become liable for the whole amount; and upon the principal becoming insolvent, the creditor sued the Plaintiff and obtained payment of the amount due. The Plaintiff filed his bill against the other surety in the first bond for contribution: —*Held*, upon the parol evidence (which the Court considered to be admissible), that a co-suretyship was intended by the parties; but that even if the Defendant had not known of the Plaintiff's suretyship, the Plaintiff would still have been entitled to contribution as against him. Whiting *v.* Burke - - - - - - 539

COUNTY COURT JURISDICTION — *Transfer — Order of County Court to pay Costs after Transfer discharged.*] After an order by a County Court to transfer a cause to the Court of Chancery, the jurisdiction of the County Court is gone, and an order by it that the Plaintiff should pay costs was discharged without prejudice to any order the Court of Chancery might make as to the costs. Hares *v.* Lea - - - - - 683

COVENANT—To settle future property - 585
See Covenant to Settle.

COVENANT TO SETTLE — *After-acquired Property—Vested Remainder in Land.*] By a marriage settlement, the intended wife and husband severally covenanted with the trustees, that in case the marriage should be solemnized, all the estate, property, and effects, both real and personal, which the husband and wife, or either of them, in right of the wife, "shall at any time or times during the said intended coverture become seised or possessed of, or entitled to," should be settled. At the date of the settlement and of the marriage the wife was entitled to a vested remainder in land, expectant on the death of a tenant for life, who outlived the coverture:—*Held*, that the land was not subject to the trusts of the settlement. *In re* Pedder's Settlement Trusts [585

CREDITOR—Non-execution of composition deed [554
See Assignment for Benefit of Creditor.

—— Secured, proof by, in winding-up - 11
See Creditor holding Security.

CREDITOR HOLDING SECURITY — *Proof in Winding-up — Proof against Two Estates — Interest—Delivery up of Securities.*] A secured creditor cannot be deprived of his security until he has been paid in full the principal, interest, and costs due thereon. A holder of bills of exchange drawn upon and accepted by company *A.* and indorsed by company *B.* proved the bills against both companies, which were in liquidation, and received dividends from both estates. The liquidator of company *A.* applied for an order for delivery up of the bills on payment of a balance arrived at by treating all dividends paid by company *A.* as applied in reduction of principal, and those paid by company *B.* as applied first in payment of interest, and then, as to the surplus, in reduction of the principal: — *Held*, that the balance was calculated on an erroneous principle, and that the creditor could not be required to deliver up the bills until he received his principal, interest, and costs in full. *In re* Joint Stock Discount Company. Warrant Finance Company's Case. (No. 2.) - - - 11

CREDITORS' DEED—Annulling registration 57
See Annulling Registration.

—— Plea of assignment by - - 398
See Plea of Assignment to Trustees.

—— Unreasonableness of amount of composition
See Annulling Registration. [57

CURRENT ACCOUNT—Security for balance 467
See Security for Balance.

CUSTOM OF STOCK EXCHANGE—*Company—Sale of Shares—Indemnity—Concealed Principal.*] *A.*, through his broker, sold shares to a jobber, from whom *B.* had agreed to purchase the same number of shares, giving the name of *C.*, one of his workmen, as the person to whom the shares were to be transferred. *A.* executed the transfer to *C.*, and afterwards received the purchase-money; but from the winding-up of the company the transfer was not registered, and the shares still remained in the name of *A.*:—*Held*, that *B.*, as the real purchaser and equitable owner, was bound to indemnify *A.* against all calls in respect of the shares. Castellan *v.* Hobson - 47

DAMAGES UNDER CAIRNS' ACT—*Patent—Expiration—Equitable Relief—Damages.*] The Court will not entertain a bill for the mere purpose of giving relief in damages for the infringement of a patent when the bill has been filed so immediately before the expiration of the patent as to render it impossible to have obtained an interlocutory injunction. Betts *v.* Gallais - 392

DEATH—Before share payable - - 224
See Death before "Payable."

—— Bequest referring to, with words of contingency - - - - 36
See Death coupled with a Contingency.

—— One of three co-Plaintiffs - - 401
See Revivor and Supplement.

DEATH BEFORE "PAYABLE"—*Will—Construction—Gift to Individuals at Twenty-one—Gift over before "payable."*] A testator devised his residuary real and personal estate to trustees, upon trust to pay the income to his son during his life, and after his decease to sell the same, and to pay and divide the proceeds among the testator's eleven grandchildren, *nominatim*, as and when they should respectively attain twenty-one; and if any of such grandchildren should die before such share should become payable, without leaving any child him or her surviving, then the share of any grandchild so dying was to go to the survivors; but in case any of such grandchildren should die before his or her share should become payable, leaving any child or children him or her surviving, then the share of him or her so dying was to go to his or her children:—*Held*, that the word "payable" in the gift over must be construed "vested," and, therefore, that the share of a grandchild who attained twenty-one, and died in the lifetime of

DEATH BEFORE "PAYABLE"—*continued.*
the tenant for life, did not pass under the gift over, but was payable to his legal personal representative. *In re Wilmott's Trusts* (Law Rep. 7 Eq. 532) discussed. HAYDON *v.* ROSE - 224

DEATH COUPLED WITH A CONTINGENCY—*Will—Construction—Vesting.*] Bequest to *A.* for life, and after the death of *A.*, then if *A.* shall "leave issue," upon trust to transfer the share of *A.* to "such" issue equally if more than one when and so often as they shall severally and respectively attain twenty-one, with a trust for maintenance in the meantime; and in case of the death of *A.* "leaving no issue," or if *A.* should happen to "leave issue," then upon the death of "such" issue under twenty-one, over;—*Held*, that the contingency of surviving *A.* was part of the gift to *A.'s* issue, and that therefore three children of *A.* who attained twenty-one, but died in her lifetime, took nothing; but that one child who alone survived *A.* took the whole. *Bryden* v. *Willett* (Law Rep. 7 Eq. 472) observed upon; *Sheffield* v. *Kennett* (4 De G. & J. 593) followed. *In re* WATSON'S TRUSTS - - 36

DEBENTURE—Assignment of - - 458
See ASSIGNMENT OF DEBENTURE.

DECEASED SHAREHOLDER—*Joint Stock Company — Executors — Payment of Legacy — Subsequent Winding-up — Liability for Calls.*] The executors of a shareholder in a joint stock company, which was a going concern at the time of the testator's death, paid a legacy under his will without providing for any contingent liability in respect of the shares which they retained unsold. The company was subsequently wound up, and the executors were placed on the list of contributories:—*Held*, that they were liable to pay the amount of the legacy in satisfaction of calls. TAYLOR *v.* TAYLOR - - - - 477

—— Liability—Specialty debt - 443,629
See SPECIALTY DEBT. 1, 2.

DECLARATION OF TITLE ACT, 1862 (25 & 26 *Vict. c.* 67), *ss.* 8, 9, 11—*Practice.*] A certificate of the Petitioner's title having been made by the Chief Clerk upon Petition under the *Declaration of Title Act*, 1862, the Court, pursuant to ss. 8, 9, and 11 of the Act, ordered the declaration establishing the Petitioner's title to be made at the end of three months; security to be given by the Petitioner, to the amount of £40, for payment of the costs of any person who might successfully oppose the declaration of title; and notice of the order to be given by advertising it three times, at three days' interval, in each of three *London* newspapers. *In re* ROBERTS - - 402

DECLARATION OF TRUST—Gift of India bond
See VOLUNTARY GIFT. [475

DEMURRER—Partial, without answer to rest of bill - - - - - 471
See RECEIVER.

DESCRIPTION — Insufficiency of — Bills of Sale Act - - - - - 63
See BILL OF SALE.

DISENTAILING DEED—Disclaimer by grantee
See DISCLAIMER. [17

DESIGNATIO PERSONÆ—Illegitimate children
See ILLEGITIMATE CHILDREN. [160

DIRECTORS—Misconduct of - - 298
See MISCONDUCT OF DIRECTORS.

—— Liability of - - - - 73
See VARIANCE BETWEEN PROSPECTUS AND MEMORANDUM.

—— Security given to - - - 168
See FRAUDULENT PREFERENCE.

—— Unregistered mortgage by - - 515
See UNREGISTERED MORTGAGE.

DISCLAIMER—*Estate tail—Disentailing Deed—Grant—Statute of Uses—Disclaimer by Grantees.*] *M.*, a tenant in tail in possession of an estate, executed a disentailing deed, purporting to be a grant of the estate to *A.* and *B.* and their heirs, free from all estates tail of the grantor, to the use of *A.* and *B.* and their heirs upon trust for the grantor. The deed was inrolled but not executed by *A.* and *B.*, who subsequently executed a deed of disclaimer:—*Held*, that the disentailing deed operated as a grant and not by the *Statute of Uses*; that it was rendered inoperative by the subsequent disclaimer by the grantees; and that the estate tail of *M.* was not barred under 3 & 4 Will. 4, c. 74. PEACOCK *v.* EASTLAND - 17

DISMISSAL FOR WANT OF PROSECUTION—Waiver of previous irregularity - 210
See WAIVER OF IRREGULARITY.

DISPOSITION AFTER WINDING-UP—Charge on calls - - - - - 312
See BORROWING POWERS. 1.

DISSOLUTION OF MARRIAGE—Settled property of wife - - - - 15
See WIFE'S SETTLED PROPERTY.

DOMICIL—Foreign—Legacy—Succession duty
See SUCCESSION DUTY. [288

—— Original—Abandonment of - - 589
See DOMICIL OF ORIGIN.

DOMICIL OF ORIGIN—*Abandonment.*] The rule that a man will be considered as domiciled in the place where his wife permanently resides, and in which he has fixed his establishment, is not affected by the circumstance that the choice of residence has been made in deference to the wishes of the wife, and that the house has been bought and furnished at her instance and with her money. AITCHISON *v.* DIXON - - 589

DOUBTFUL TITLE—*Vendor and Purchaser—Specific Performance.*] Discussion of the circumstances under which the Court will not decree specific performance, on the ground that the title is too doubtful to be forced on a purchaser.—The principles laid down in *Pyrke* v. *Waddingham* (10 Hare, 1) approved of; but the decision disapproved of, and not followed under precisely similar circumstances. MULLINGS *v.* TRINDER - 449

DRAMATIC WORK — Foreign — Copyright — Translation - - - - 193
See INTERNATIONAL COPYRIGHT.

DURATION OF POWER—*Marriage Settlement—Power of Sale—Exercise of Power of Appointment to Children of the Marriage.*] By a marriage settlement lands were conveyed to the use of trustees and their heirs, upon trusts for husband and wife for life, and in default (which happened) of children of the marriage, for the children of *A.*, as the wife should by deed or will appoint. The

DURATION OF POWER—*continued.*
settlement contained usual powers of sale and exchange, and reinvestment of the purchase-money in land. The wife, with the concurrence of the husband, appointed and conveyed the lands to and to the use of the trustees and their heirs, upon trust, subject to the life estates, as to four undivided fifths of the lands, for *B.*, *C.*, *D.*, and *E.*, four of the five children of *A.*, and their heirs, as tenants in common; and as to the remaining fifth, for *F.*, the fifth child, for life, with remainder to *B.*, *C.*, *D.*, and *E.*, their heirs and assigns, as tenants in common. *F.* was of unsound mind—not so found by inquisition. *B.*, *C.*, *D.*, *E.*, and *F.* were all living at the date of the original settlement, and were still living; and all, except *F.*, were *sui juris*. The wife having survived her husband:—*Held*, that the power of sale in the original settlement was still subsisting over the whole of the lands; and that the trustees of the settlement could make a title to a purchaser. *In re* Brown's Settlement - - - 349

DUTY—Legacy—Partnership property - 179
See Legacy Duty.

—— Succession—Legacy—Foreign domicil 288
See Succession Duty.

"DYING WITHOUT ISSUE"—*Equitable Estate Tail.*] A settlor conveyed an estate to trustees to the use of himself for life, with remainder to the use of *D.*, his heirs and assigns, but if *D.* should die without issue, then to the use of *T.*, his heirs and assigns, and if both *D.* and *T.* died without issue, then to the issue male of the settlor. —*D.* died without issue in the lifetime of *T.*, who afterwards died intestate, leaving *X.*, his only son, him surviving. The settlor survived *T.*, but died in the lifetime of *X.*:—*Held*, that *T.* took an equitable estate tail. Morgan *v.* Morgan 99

EASEMENT—Canal—Right to take water from [141
See Standing by and allowing building. 1.

ESTATE TAIL—Dying without issue - 99
See Dying without Issue.

—— Statute of Limitations—Ineffectual disentailing deed - - - 99
See Limitations, Statute of.

EVIDENCE—Husband and wife—Non-access—Evidence of husband - - 41
See Evidence of Husband.

—— Winding-up—Witness declining to answer
See Witness in Winding-up. [675

EVIDENCE OF HUSBAND—*Evidence—Proceeding instituted in consequence of Adultery—Non-access—Corroboration*—32 & 33 *Vict. c.* 68, *s.* 3.] A petition by a widower claiming to be interested for life, and five children of the marriage claiming to be interested absolutely, in the reversion of a fund, and praying for payment of moneys out of Court, was opposed by a Respondent who claimed to be entitled, as one of the children of the marriage, to one-sixth of the reversion. The husband gave evidence that the opposing Respondent was born during the coverture, but alleged his illegitimacy on the ground of non-access.—The Court, notwithstanding the enactment of the *Evidence Further Amendment Act*, 1869 (32 & 33 Vict. c. 68), s. 3, which enables husbands and wives of parties to give evidence in any proceeding instituted in consequence of adultery, required corroboration of the husband's evidence as to non-access. *In re* Rideout's Trusts - - - - 41

EXCEPTIONS TO ANSWER—*Practice—Pleading—Interrogatory not founded on Specific Allegation.*] A Defendant will be required to answer an interrogatory which is pertinent to the case made by the bill, though it is not founded on any specific allegation in the bill, where the Plaintiff has no knowledge on which to found such allegation. M'Garel *v.* Moon - - - 22

EXECUTION CREDITOR—*Bankruptcy Act*, 1869, *s.* 95, *sub-s.* 3; *s.* 125, *sub-ss.* 4, 5, 7—*Seizure and Sale—Liquidation by Arrangement.*] Sect. 95, sub-sect. 3 of the *Bankruptcy Act*, 1869, does not protect an execution against the claim of a trustee under a liquidation, who has been appointed after seizure and before sale, even though the sale has been delayed by an injunction obtained under Rule 260 of the Bankruptcy Orders, 1870. *Ex parte* Veness. *In re* Gwynn - - 419

2. —— *Bankruptcy Act*, 1869, *ss.* 11, 95, *sub-s.* 3; *s.* 125, *sub-ss.* 4, 5, 7—*Seizure and Sale—Liquidation by Arrangement—Relation back.*] In sect. 95, sub-s. 3 of the *Bankruptcy Act*, 1869, "act of bankruptcy" means an act of bankruptcy which has been committed at the time of seizure.—Therefore, where a Petition for liquidation was presented after the goods of the debtor, a non-trader, were seized in execution, and the sale took place before the appointment of a trustee, and no act of bankruptcy had been committed before the seizure:—*Held*, that the execution creditor was entitled to the proceeds.—*Semble*, the rights of a trustee under a liquidation relate back in the manner as those of a trustee under a bankruptcy. *Ex parte* Todhunter. *In re* Norton - 425

3. —— *Bankruptcy Act*, 1869, *s.* 6, *sub-s.* 5; *ss.* 11, 87, 95, *sub-s.* 3; *s.* 125, *sub-ss.* 4, 5, 7—*Execution—Seizure and Sale—Application of Proceeds—Liquidation by Arrangement—Relation back.*] In sect. 87 of the *Bankruptcy Act*, 1869, "bankruptcy petition" includes a petition for liquidation. Therefore where the sheriff seized and sold the goods of a trader on a judgment for more than £50, and after the sale a petition for liquidation was presented, of which the sheriff had notice within fourteen days, an order restraining the sheriff from paying the proceeds to the execution creditor, and directing payment to the trustee when appointed, affirmed. *Ex parte* Key. *In re* Skinner - - - - 432

EXECUTORS—Liability for calls - - 477
See Deceased Shareholder.

—— Payment of legacy in their own wrong 477
See Deceased Shareholder.

—— Power of sale of real estate—Administration summons - - - - 230
See Administration Summons.

EXECUTORY GIFT—*Will—Construction—Contingent Remainder—Gift to A. if living at the Death of B., followed by Gift over if A. should die in the Lifetime of B. without leaving Issue.*] By a will the testator gave real and personal estate to *M. H.*, her heirs, executors, administrators, and

EXECUTORY GIFT—*continued.*
assigns absolutely, if she should be living at the death of the testator's wife: but in case *M. H.* should die in the lifetime of the testator's wife without leaving issue her surviving, then over:—*Held*, that *M. H.* took an absolute interest, liable to be divested only in the event of her death in the lifetime of the testator's widow without leaving issue. Finch *v.* Lane - - - 501

EXECUTORY SETTLEMENT — *Will — Construction.*] Devise subject to life interest of testator's widow, upon trust to convey, assign, and assure freehold property "unto and to the use of my son *T. F.*, and the heirs of his body lawfully issuing, but in such manner and form, nevertheless, and subject to such limitations and restrictions, as that if *T. F.* shall happen to die without leaving lawful issue, then that the property may after his death may descend unincumbered unto and belong to my daughter *R. F.*, her heirs, executors, administrators, and assigns":—*Held*, that the devise was an executory trust to be executed by a conveyance to the use of *T. F.* during his life, with remainder to his first and other sons and daughters as purchasers in tail, with remainder to *R. F.* in fee. Thompson *v.* Fisher - 207

2. —— *Will—Construction—Executory Trust —"Strict Settlement"—Life Estate—Impeachment of Waste.*] Where an executory trust for the settlement of freehold estates "in strict settlement" directs, either expressly or by reference to the trusts of other property, that certain persons shall take life estates, the use of the words "in strict settlement" does not make the tenants for life dispunishable for waste. Stanley *v.* Coulthurst - - - - 259

EXECUTORY TRUST - - - - 259
See Executory Settlement. 2.

EXONERATION—Locke King's Act - 377
See Locke King's Act.

—— Personal estate - - - - 545
See Exoneration of Personal Estate.

EXONERATION OF PERSONAL ESTATE—*Charge of Debts on Real Estate*—A testatrix gave her real estate in trust for her two daughters, *I. McCarty* and *M. Streffi*, for life, and afterwards each moiety to go to the sons of each of her daughters and their families, and after giving various legacies, she left the residue of her estate to her grandpaughters. By a codicil the testatrix directed that certain debts incurred by her for her son-in-law *J. McCarty* should be exclusively, and in the first instance, borne by and paid out of the *McCarty* moiety of her real estate, exempting the *Streffi* moiety from payment of such debts:—*Held*, that the codicil amounted to an express exoneration of the personal estate of the testatrix; and that the moiety of her real estate devised to the *McCarty* family was primarily liable to the debts. Forrest *v.* Prescott - - - - 545

EXTINCTION OF POWER—*Mortgage—Power of Sale—Transfer.*] In 1825 real estate was mortgaged for £27,000, to be repaid with interest twelve months after the date of the mortgage; and the mortgage deed contained a power of sale exerciseable in case of default in payment. In 1830, default having been made, the mortgage debt was transferred. The deed of transfer contained a recital that the power of sale had not been and was not intended to be exercised; an assignment of the mortgage debt "and all powers and remedies for recovering the same;" a conveyance of the mortgaged property freed from the old proviso for redemption, and subject to a new one, by which the mortgage debt was to be repaid with interest, at the expiration of seven years from the date of the mortgage; covenants for the payment of the principal at the expiration of seven years, and of interest half-yearly in the meantime: and a power of sale exerciseable in default of payment of principal or interest; and it was also thereby agreed that the mortgage debt should remain on the security of the mortgage for seven years, unless the mortgagor should die or make default in the payment of interest in the meantime:—*Held*, that the power of sale in the deed of 1825 was absolutely extinguished by the deed of transfer, and not merely suspended for seven years. Boyd *v.* Petrie - - - 482

EXTINCTION OF POWER—*continued.*

FEU DUTIES—Proof for in winding-up - 413
See Proof for Feu Duties.

FOREIGN SECURITIES—French railway bonds —Investment by trustees - - 39
See Investment by Trustees. 2.

FORFEITURE CLAUSE—*Scotch Sequestration—Discharge—Annuity.*] Subject to the life-interest therein of *X.*, property was devised to trustees, upon trust thereout to pay an annuity of £100 to *A.* (husband of testatrix) during his life, with a direction that if *A.* should become bankrupt, or should assign, charge, incumber, or suffer any act whereby the same would, if belonging absolutely to him, become vested in any other person or persons, then and in such case the said annuity should not be payable, or should cease to be payable, as the case might require, in the same manner as if *A.* was dead; with a further direction that it should be lawful for her trustees in their discretion, and without assigning any reason for so doing, at any time to refuse or discontinue payment of the annuity to *A.* during the whole or any portion of his life. Two years before the date of the will, *A.* was, with the knowledge of the testatrix, adjudged bankrupt under a sequestration according to Scotch law. *X.* survived the testatrix, and died on the 4th of April, 1868. On the 29th of August, 1868, *A.* obtained his discharge under the sequestration, and on the 10th of February, 1869, the trustee under the sequestration was discharged from his office of trustee:—*Held*, that the Scotch sequestration was not a forfeiture within the meaning of the clause of forfeiture, and that the annuity was subject to the absolute discretion of the trustees of the will as to the payment to *A.* Trappes *v.* Meredith 604

FRAUD—Company—Prospectus - - 73
See Variance between Prospectus and Memorandum.

FRAUDULENT APPOINTMENT—*Benefit of Appointor—Vendor and Purchaser—Specific Performance.*] An appointment made with the object that the appointor may obtain an exclusive advantage to himself is bad: but if the object of the appointment be to secure a benefit for all the objects of the power, the appointment is not bad,

FRAUDULENT APPOINTMENT—*continued.*
although the appointor may to some extent participate in such benefit. The tenant for life of real estate under a marriage settlement had a power of appointing the estate among the children of the marriage, of whom there were four. The settlement contained no power of granting building leases. An appointment was made to one of the children of the marriage; and, subsequently, the appointor and appointee joined in conveying the estate to trustees upon trust to grant building leases, and subject thereto as to one fourth thereof upon trust for the appointee, and as to the remaining three fourths upon trusts corresponding with those of the original settlement:—*Held*, that although the object of the appointment was to enable building leases to be granted, and the tenant for life thereby gained an advantage to himself, yet the transaction, being for the benefit of all the objects of the power, was valid; and that a purchaser would obtain a good holding title thereunder. Whether such a title could be forced on an unwilling purchaser, *quære*. *In re* Huish's Charity - - - - 5

FRAUDULENT PREFERENCE — *Company — Winding-up— Security given to Director—Companies Act*, 1862, *s.* 164—*Duty of Director.*] A security given by an insolvent company for payment of a debt due to a director cognisant of the state of the company's affairs, may be set aside as an undue preference under sect. 164 of the *Companies Act*, 1862, even although the director may have pressed for payment of his debt. A director desiring to obtain payment of his debt under such circumstances ought to resign his office before applying to the company for payment. A bill to set aside such a security may be filed in the name of the company as Plaintiff. Gaslight Improvement Company *v.* Terrell - 168

2. —— *Bankruptcy — Bankruptcy Act*, 1869, *s.* 92.] Sect. 92 of the *Bankruptcy Act*, 1869, has not altered the law with respect to fraudulent preferences, and it is still necessary, in order to constitute a fraudulent preference, that the conveyance or transfer be made voluntarily and in contemplation of bankruptcy. Therefore, where a creditor told his debtor "that he should like his money repaid," adding that "he was determined to have either the money or security," and the debtor accordingly conveyed certain property in part satisfaction of the debt, and presented a petition for liquidation shortly afterwards:—*Held*, that the conveyance was valid, and could not be set aside as being a fraudulent preference. *Ex parte* Craven. *In re* Craven and Marshall [648

FUTURE RENT—Claim for, when company reducing its capital - - - 384
See Reduction of Capital and Shares.

GIFT, ABSOLUTE OR IN TRUST—*Will—Construction—Trust or Absolute Interest.*] A testator devised to his wife his freehold estate at *A.*, and all his personal property "to be at her disposal in any way she may think best for the benefit of herself and family":—*Held*, an absolute gift. Lambe *v.* Eames - - - - 267

GIFT, ORIGINAL OR SUBSTITUTIONAL—*Will—Tenant for Life and Remainderman—Substitutional Gift to Children.*] A testator devised real estate to his wife for life, remainder to his brothers *nominatim*, as tenants in common in fee; "and" in case of the death of either of them in the lifetime of his (testator's) wife, leaving issue, testator devised the share of him so dying to "all his children," as tenants in common in fee; but in case of the death of either of them in the lifetime of his (testator's) wife, without leaving issue living at his death, or leaving such issue, and the same should die under twenty-one, testator gave the share of him so dying to the survivors equally:—*Held*, that the gift to the children, though preceded by the word "and," was a substitutional and not an original gift; hence, that those children only of a brother dying in the lifetime of the tenant for life, who survived their father, were entitled to participate in their father's share. *In re Merrick's Trusts* explained (Law Rep. 1 Eq. 551). Hurry *v.* Hurry - - - 346

GIFT TO ESTABLISH HOSPITAL—*Mortmain Act—Acquisition of Land.*] A lady gave a cheque for £5000 to the surgeon who attended her, to be laid out in the erection, establishment, and support of a hospital. The money was invested by the surgeon in consols in the names of himself and another as trustees, and both immediately afterwards executed a deed of trust declaring the objects of the gift. The declaration of trust was not made known to the donor, who died a few days after its execution:—*Held*, that the object of the gift did not exclude the acquisition of land; and that the donor having died within twelve months after the execution of the deed, the gift was invalid under the statute (9 Geo. 2, c. 36). Hawkins *v.* Allen - - - - 246

GIFT TO SUCH CHARITIES AS TRUSTEES SHOULD THINK PROPER — *Will — Mortmain Acts—*(9 *Geo.* 2, *c.* 36)*—Discretion of Trustees.*] Bequest of residue of personal estate (which included impure personalty) to trustees, upon trust to divide the same among such charities in *England* "as they in their sole and uncontrolled discretion shall think proper":—*Held*, equivalent (as to the impure personalty) to a gift to charities exempt from the *Mortmain Act*, to be selected by the trustees, and therefore a valid gift. Lewis *v.* Allenby - - - - - 668

GRANT—Disclaimer by grantee — Disentailing deed - - - - - 17
See Disclaimer.

HEIRS-AT-LAW—Claim by—No jurisdiction to appoint receiver - - - 471
See Receiver.

HUSBAND AND WIFE—Covenant to settle after acquired property - - - 585
See Covenant to settle.

—— Evidence of non-access - - - 41
See Evidence of Husband.

—— General power to wife—Exercise during coverture - - - - 220
See Power, General or Limited.

—— Reduction into possession - - 589
See Reduction into Possession.

—— Separate estate—Liability of - - 88
See Separate Estate, Liability of.

HUSBAND AND WIFE—*continued.*
—— Settled property of wife—Dissolution of marriage - - - - 15
See Wife's Settled Property.

ILLEGITIMATE CHILDREN—*Will—Construction—Gift to Children—Designatio Personæ.*] A testator devised and bequeathed his real and residuary personal estate to trustees, upon trust to permit his wife *M.* to receive the income thereof during her life, provided she should so long continue his widow and unmarried; and from and after her death or second marriage, upon trust to pay and divide the said estate unto and equally between and amongst all and every his children, if more than one, in equal shares as tenants in common, and in case there should be but one such child, then the whole to go to such child. The testator had married a wife, *E.*, but had had no children by her, and had lived apart from her for many years. At the date of the will she was of the age of seventy years, and she survived the testator. The testator had, for some years previously to the date of the will, cohabited with *M.*, who bore his name, and was always recognised by him as his wife. The testator had by *M.* four children, of whom two had died before the date of the will; one was then alive, and the fourth was afterwards born. These children were all entered in the baptismal registry in the name of the testator, and were known by his name:—*Held*, that *M.* was entitled to the income of the real and personal estate of the testator for her life so long as she should continue unmarried, and that after her death such estate would devolve on the child of the testator and *M.* who was living at the date of the will. Lepine *v.* Bean - 160

IMPEACHMENT OF WASTE—Executory settlement - - - - 259
See Executory Settlement.

IMPROVEMENT COMMISSIONERS—Application of rates - - - - 152
See Application of Rates.

IMPROVIDENT SETTLEMENT—Young lady just of age - - - - 405
See Voluntary Settlement.

INDIA BOND—Gift of—Declaration of trust 475
See Voluntary Gift.

INFANT—Ward of Court, how made - 530
See Ward of Court.
—— Wife's settled property—Dissolution of marriage - - - - 15
See Wife's Settled Property.

INFORMAL AFFIDAVIT—*Practice—Omission in formal Part.*] The omission in the formal part of an affidavit of the words "make oath and," will render it inadmissible. Allen *v.* Taylor 52

INJUNCTION—Champerty—Restraining action on ground of - - - 367
See Champerty.
—— Interference with statutory right—Sewage of town - - - - 354
See Sewers.
—— Nuisance—Pollution of stream by Board of Health - - - - 131
See Pollution of River.
—— Ornamental timber - - - 465
See Timber.

INQUIRY AS TO WILL—Specific performance—Objection raised too late - - 228
See Time the Essence of the Contract. 1.

INTEREST—Balance of profits—Manager's salary
See Interest on Balances. [393
—— Mortgagee in possession—Purchase-money—Rents - - - - 497
See Mortgagee in Possession.
—— Usury—Sale of reversionary interest 641
See Unconscionable Bargain.

INTEREST ON BALANCES—*Manager—Salary measured by Percentage of Profits—Arrears of Salary—Interest.*] Defendant, an owner of ironworks, engaged the Plaintiff as his manager, and verbally agreed to pay him 7½ per cent. of the profits, to be made up to £500 in any year in which the profits should be less than that sum. For several years Defendant paid the Plaintiff at the rate of £500, but it turned out that in some of the years the percentage of profits exceeded £500; and a sum consisting of the total of these overbalances had been found due from the Defendant to the Plaintiff:—*Held*, that, in the absence of fraud, the Plaintiff was not entitled to interest on each overbalance as from the year in which it was ascertained, but only to interest from the time of demand. *Pearse* v. *Green* (1 Jac. & W. 135) distinguished. Rishton *v.* Grissell - 393

INTERNATIONAL COPYRIGHT—*Dramatic Piece—Translation sanctioned by the Author*—15 *Vict. c.* 12, *s.* 8, *subs.* 6.] The intention of the framers of the *International Copyright Act of* 1852, in requiring that, in order to entitle the foreign author of a dramatic piece to the benefit of the Act, a translation sanctioned by the author must be published within three calendar months of the registration of the original work, was to give to English people the opportunity of knowing the foreign work as accurately as is possible by means of a translation. A translation such as is required by the Act must be a translation of the whole work; and it is not sufficient that it be a version which the foreign author may have sanctioned as a translation. Where the original work sought to be protected was a French comedy entitled "*Frou-frou*," and the version sanctioned by the foreign authors and published in *England* was entitled "*Like to Like*;" the names of the characters and the scenery were changed from French to English; in some instances English manners were substituted for French; and considerable omissions of speeches and alterations of passages were made:—*Held*, that the version was not a translation within the meaning of the Act, such as to entitle the foreign authors and their assignee to the benefit of the statute. Wood *v.* Chart. Wood *v.* Wood. 193

INTERROGATORIES—Not founded on specific allegation—Pertinence - - 23
See Exceptions to Answer.

INVESTMENT—Lands Clauses Act—Costs 612
See Costs under Lands Clauses Act.
—— Trust money—Foreign securities—French railway - - - - 39
See Investment by Trustees. 2.
—— Trust money—Railway stock - - 26
See Investment by Trustees. 1.

INVESTMENT BY TRUSTEES—*Permanent Securities—Railway Stock.*] A testator directed his trustees to lay out and invest £15,000 upon Government real or personal security, or in such stocks, funds, or shares as they might, in their absolute discretion, think fit, and pay the interest to his wife for life; the capital to be for his children. The trustees, with the sanction of the widow, invested a portion of the money upon railway stock bearing a high rate of interest. Upon her death the securities were greatly reduced in value:—*Held*, that the trustees were bound to invest upon securities of a permanent nature; that, in the absence of evidence to the contrary, it must be assumed from the rate of interest that these investments were not permanent; and that the £15,000 must now be invested for the benefit of the children of the testator. Stewart *v.* Sanderson - - - - - 26

2. —— *Settlement—Securities of a Foreign Country—Bonds of French Railway Company.*] Under a settlement the trustees were empowered to invest the trust funds in the "bonds, debentures, or other securities, or the stocks or funds of any colony or foreign country." The question arose whether they could properly invest in the bonds of a French railway company the payment of the capital on which within fifty years was secured by a sinking fund guaranteed, together with interest in the meantime, by the Imperial Government:—*Held*, that these bonds were not "securities of a foreign country" within the meaning of the trust for investment. *In re* Langdale's Settlement Trusts - - - 39

ISSUE—Dying without—Estate tail - 99
See Dying without Issue.

—— Surviving their parents—Leaving issue 36
See Death coupled with a Contingency.

JOINT MORTGAGEES—Acknowledgment—Statute of Limitations - - 275
See Limitations, Statute of. 2.

JUDGMENT CREDITOR—Sequestrator—27 & 28 Vict. c. 112 - - - - 442
See Sequestration.

—— Seizure and sale - - 419, 425, 432
See Execution Creditor. 1—3.

JURISDICTION — Chancery — Restraining action on ground of champerty - - 367
See Champerty.

—— County Court—Transfer of cause—Costs
See County Court Jurisdiction. [683

—— Receiver—Contested heirship - 471
See Receiver.

—— Winding-up—Canal company incorporated by Act of Parliament - - 331
See Winding-up Petition. 1.

LACHES — Contributory — Misrepresentation in prospectus - - - - 503
See Misrepresentation in Prospectus.

—— Impeaching creditors' deed - - 57
See Annulling Registration.

LEASE—Agreement for - - 141, 678
See Standing by and allowing building. 1, 2.

LEASE—Assignment of, by creditors' deed 393
See Plea of Assignment to Trustees.

—— Fund for renewal - - - 572
See Apportionment—Tenant for Life and Remainderman.

LEASEHOLDS—Included in real estate - 562
See "Real Estate."

LEAVING ISSUE—Time of ascertaining contingency - - - - 36
See Death coupled with a Contingency

LEGACY—Lien for—Condition of conveying real estate - - - - 433
See Lien for Legacy.

LEGACY DUTY—*Partnership Property.*] Legacy duty is payable upon the share of a deceased partner, a domiciled Englishman, in the proceeds of freehold property in *Bombay* used for the purposes of the partnership, and forming a partnership asset. Forbes *v.* Steven. Mackenzie *v.* Forbes - - - - - 178

LESSOR—Claim for future rent—Company reducing its capital - - - 384
See Reduction of Capital and Shares.

LIABILITY—Executors of deceased shareholders
See Deceased Shareholder. [477

—— Separate estate of married woman - 88
See Separate Estate, Liability of.

—— Shareholder—Specialty debt - 443, 629
See Specialty Debt. 1, 2.

LIEN—Calls—Debenture holder - - 458
See Assignment of Debenture.

—— Legacy—Condition of conveying real estate
See Lien for Legacy. [438

LIEN FOR LEGACY—*Will—Legacy on Condition of Conveying Real Estate—Conveyance—Lien for Unpaid Legacy.*] A testator gave a legacy to each of his daughters on condition that she should convey her share of certain real estate, to which the daughters were entitled, to the sons of the testator; and in case of any daughter refusing or being unable to comply with the condition, the legacy bequeathed to her was to be forfeited and to form part of the testator's residuary personal estate. The testator gave his residuary personal estate to his sons; and he appointed one of them and two other persons executors. The daughters conveyed their shares of the real estate to their brothers, but did not obtain payment of the legacies:—*Held*, that they were not entitled to any lien in the nature of a vendor's lien on the real estate conveyed by them for their legacies. Barker *v.* Barker - - - - 438

LIMITATIONS, STATUTE OF — 3 *&* 4 *Will.* 4, *c.* 27, *s.* 23—*Estate tail—Ineffective Disentailing Deed.*] More than twenty years before the filing of the bill, and after the death of the settlor, *X.*, under a mistake as to his rights, executed a conveyance of the estate to a Defendant, who immediately entered into possession. This deed was not inrolled. The only son of *X.* filed this bill eight years after the death of *X.*, and one year after attaining twenty-one:—*Held*, that his claim was not barred by the *Statute of Limitations* (3 & 4 Will. 4, c. 27), s. 23, and that he was entitled to have the property delivered up to him, with an account of rents from the filing of the bill, as in

LIMITATIONS, STATUTE OF—*continued.*

Penny v. *Allen* (7 D. M. & G. 409). Morgan *v.* Morgan - - - - - 99

—— —— *s.* 28—*Mortgage—Redemption—Joint Mortgagees.*] Upon a bill filed to redeem a mortgage where two joint mortgagees had been in possession for more than twenty years:—*Held*, that an acknowledgment by one only of the two joint mortgagees did not entitle the mortgagor to redeem. Richardson *v.* Younge - - - 275

LIQUIDATION BY ARRANGEMENT—Rights of execution creditor - 419, 425, 432
See Execution Creditor. 1—3.

LOCAL BOARD OF HEALTH—Pollution of stream
See Pollution of River. [131

LOCKE KING'S ACT (17 & 18 *Vict. c.* 113)—"*Contrary Intention.*"] Where a testator, by a will dated in 1857, after giving a general direction that his debts should be paid as soon as could be after his decease, devised in strict settlement real estates which were subject to mortgagees; directed the trustees, during minorities, to receive the rents and profits of the estates, and thereout, amongst other things, to keep down the interest of any sums which might be charged by way of mortgage, or otherwise, on the premises; gave power of sale and exchange over part of the mortgaged estates only; and bequeathed his residuary personalty to his next of kin:—*Held*, that no contrary intention had been sufficiently signified to exclude the operation of *Locke King's* Act.—Observations on a *dictum* in *Pembrooke* v. *Friend* (1 J. & H. 132). Coote *v.* Lowndes - 376

MAINTENANCE OF INFANTS — Order for — Ward of Court - - - 530
See Ward of Court.

MAINTENANCE OF SUIT - - - 367
See Champerty.

MANAGER — Salary by profits — Interest on balances - - - - 393
See Interest on Balances.

MANOR—Right of common—Right of recreation—Bill by freeholder - - 105
See Right of Common.

MARRIAGE SETTLEMENT - - - 585
See Covenant to settle.

MASTER AND SERVANT—Maintenance of litigation by servant - - - 367
See Champerty.

MINES—Title to—Right to rescind contract 212
See Rescinding Contract.

MISCONDUCT OF DIRECTORS—*Companies Act*, 1862, *ss.* 100, 165—*Misappropriation of Funds—Officers of the Company—Bankers.*] Upon a motion that the *National Bank*, and three of its directors, might be ordered to pay to the liquidators of the company a sum of £5000, alleged to have been improperly paid out of the funds of the company as an inducement to the bank to open an account with the company:—*Held*, that the payment for opening an account with the banker was a misappropriation of the funds of the company, but that, as there was no direct proof that this money was paid by the company, the Court could make no order, upon a motion under the 100th section of the *Companies Act*, 1862, for its

MISCONDUCT OF DIRECTORS—*continued.*

restoration; and the Court being of opinion that a banker was not an officer of the company within the 165th section of the Act, no order could be made under that section.—Leave given to file a bill against the directors. *In re* Imperial Land Company of Marseilles. *In re* National Bank [298

MISREPRESENTATION—Prospectus of company [503
See Misrepresentation in Prospectus.

—— Prospectus of company - - - 73
See Variance between Prospectus and Memorandum.

MISREPRESENTATION IN PROSPECTUS—*Company—Winding-up—Contributory—Repudiation—Laches.*] *M.*, a shareholder in a company, discovered fraudulent misrepresentations in the prospectus on the faith of which he had taken his shares, and thereupon repudiated the shares, both privately, in an interview with the secretary, and publicly, at a meeting of shareholders. Other shareholders also repudiated their shares, and instituted proceedings for the purpose of having their names removed from the register, while the company commenced actions against them for the recovery of unpaid calls; but *M.* took no steps whatever, nor were any steps taken against him. After the public meeting, *M.* received two circulars issued by the directors of the company, one of which stated that, at the request of the dissentient shareholders, they had consented to stay legal proceedings for a time, with a view, if possible, of amicably settling their differences, and that they would, as soon as possible, communicate the result to the shareholders; and the other stated that the directors intended to appeal against a decision in a suit instituted by one of the shareholders for the purpose of being relieved from his shares. The company having been ordered to be wound up:—*Held*, that, under the circumstances, *M.* was not a contributory. *In re* Estates Investment Company. McNiell's Case - 503

MISTAKE—Settlement - - - 599
See Mistake in Settlement.

—— Will—Description of devisee - - 29
See Mistake of Testator.

MISTAKE IN SETTLEMENT—*Marriage Settlement—Rectification—Petition—Form of Order.*] By a mistake in pencil directions given to a clerk or stationer, a clause of a sentence was inserted in a marriage settlement which on the face of the deed was repugnant to the sense, and which led to a highly improbable result. The fact of the mistake was not admitted by all parties:—The Court, on Petition under the *Trustee Relief Act*, did not order the settlement to be rectified; but, prefacing the order with a declaration that it appeared that the words in question were inserted by mistake, made an order for distribution of the fund as if the clause had not been inserted. *In re* De La Touche's Settlement - - 599

MISTAKE OF TESTATOR—*Construction of Will—Name or Description.*] A testator devised certain freehold property to trustees to the use of his son *George Gillett* for life, and after his decease to the use of "*Robert Gillett*, the fourth son of *George Gillett*," in fee, in case he should attain twenty-

MISTAKE OF TESTATOR—*continued.*
one; but if he should die under that age, to the use of the fifth son in fee, and if he should die under twenty-one, to the first son coming after the fifth who should attain twenty-one. *Robert H. Gillett* was the third, and *John William Gillet* was the fourth, son of *George Gillett*, who had seven sons. There were reasons apparent from the evidence why the testator passed over the first and second sons, but none for omitting the third son:—*Held*, that the name must prevail over the description, and that *Robert H. Gillett*, the third son, took under the above devise. Gillett *v.* Gane - - - - - 29

MORTGAGE—Costs of puisne mortgage—Sale by Court - - - - - 447
See Costs in Mortgage Suit.

—— Mortgagee in possession—Sale—Interest 497
See Mortgagee in Possession.

—— Priority—Parting with title-deeds - 92
See Priority from Negligence.

—— Reversionary interest—Usury - 641
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—— Sale under power—Application of proceeds
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—— Statute of Limitations—Redemption - 275
See Limitations, Statute of. 2.

—— Transfer—Extinction of power of sale 482
See Extinction of Power.

—— Unregistered—Poperty of company - 515
See Unregistered Mortgage.

MORTGAGEE IN POSSESSION — *Account — Sale of Mortgaged Property—Rests.*] A mortgagee in possession, who sells part of the mortgaged property under a power of sale in the mortgage, must apply the proceeds of sale, first, in payment of interests and costs, and then either pay the balance to the mortgagor, or apply it in reduction of the principal due on the mortgage; and, in taking an account against the mortgagee, who has retained sale moneys beyond the interest and costs due, a rest must be made at the time of the receipt of the proceeds of sale, even although he may have entered into possession when the interest due to him was in arrear. The same rule applies where two distinct mortgagees are held by the same person, who sells one of the mortgaged estates. Thompson *v.* Hudson - - - 497

MORTMAIN—Gift to establish hospital - 246
See Gift to establish Hospital.

—— Gift to such charities as trustees should think proper - - - 668
See Gift to such Charities as Trustees should think proper.

—— Secret trust - - - - - 438
See Secret Trust.

MOTION—Reserved to the hearing—Costs 557
See Costs in the Cause.

NAME OR DESCRIPTION - - - 29
See Mistake of Testator.

NAVIGABLE RIVER—Obstruction—Power of conservators - - - - 232
See Conservators of River.

NEGLIGENCE—Mortgagee—Parting with title-deeds - - - - 92
See Priority from Negligence.

NEW MATERIALS—Used in producing known article - - - - 522
See Specification of Patent.

NON-ACCESS—Evidence of husband - 41
See Evidence of Husband.

NOTICE—Allotment of shares - - 659
See Acceptance of Shares.

NOVATION OF CONTRACT - - - 622
See Amalgamation of Companies.

NUISANCE—Navigable river—Obstructions 232
See Conservators of River.

—— Pollution of river - - - 131
See Pollution of River.

OFFICERS OF COMPANY—Companies Act, 1862, s. 100—Misappropriation of funds 298
See Misconduct of Directors.

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PARLIAMENT—Application to—Expense of - - - - - 613
See Railways Abandonment Act.

—— Prosecution of bill in—Costs - 152
See Application of Rates.

PARTIES—Assignment in trust for creditors 398
See Plea of Assignment to Trustees.

PARTITION SUIT—*Sale—Defendant entitled to a small share out of the Jurisdiction.*] In a partition suit, where one of the parties, entitled to a small fraction of the estate, was out of the jurisdiction, and had not been served, and it did not appear that any attempt had been made to serve him:—*Held*, that a decree for sale could not, under the *Partition Act*, 1868, be made in his absence. Hurry *v.* Hurry - - - 346

PARTNERSHIP — Legacy — Duty on share of deceased partner - - - 179
See Legacy Duty.

PATENT—Assignee of - - - 509
See Register of Proprietors of Patents.

—— Damages—Infringement—Suit before expiration of patent - - - 392
See Damages under Cairns' Act.

—— Register of proprietors - - 509
See Register of Proprietors of Patents.

—— Specification—New materials to produce known articles - - - 522
See Specification of Patent.

PAYMENT OF DEBTS—Execution of special power
See Special Power. [550

PETITION—Appointment of new trustee—Costs
See Costs out of Income. [45

—— Confirmation of Sales Act—Service - 531
See Confirmation of Sales Act.

—— Winding-up - - 331, 390, 403
See Winding-up Petition. 1—3.

PLEA OF ASSIGNMENT TO TRUSTEES—*Practice—Plea—Parties—Deed of Assignment—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192–200—*Lease.*] A depositor, by way of mortgage, of a lease, made a registered assignment, under the *Bankruptcy Act*, 1861, of all his estate and effects

PLEA OF ASSIGNMENT TO TRUSTEES—*contd.*
to trustees, in favour of his creditors. The trustees had not done any act to signify their acceptance of the lease. The mortgagee filed a bill for foreclosure or sale against the mortgagor, not making the trustees parties. Plea of the assignment allowed, with leave to amend. METROPOLITAN BANK *v.* OFFORD - - - 398

PLEADING—Demurrer to part of bill cited according to Act - - - 471
See RECEIVER.

—— Exceptions to answer - - - 23
See EXCEPTIONS TO ANSWER.

—— Plea of assignment of lease to trustees by creditors' deed - - - 398
See PLEA OF ASSIGNMENT TO TRUSTEES.

POLLUTION OF RIVER—*Nuisance—Sewage—Local Board of Health.*] Bill and information filed to restrain the local board of health of a town from discharging sewage into a river dismissed with costs on the ground that the injury proved was trifling. Consideration of the circumstances under which the Court will interfere. ATTORNEY-GENERAL *v.* GEE - - 131

POSSESSION—Under Bills of Sale Act - 63
See BILL OF SALE.

POWER—Appointment by will—Property ineffectually appointed - - 1
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—— Appointment to daughter with restraint on anticipation - - - 564
See RESTRAINT ON ANTICIPATION.

—— Duration of - - - - 349
See DURATION OF POWER.

—— Extinction of—Power of sale - - 482
See EXTINCTION OF POWER.

—— Fraudulent appointment - - 5
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—— General—Not affected by subsequent limited power - - - - 220
See POWER, GENERAL OR SPECIAL.

—— Married woman—Exercise during coverture - - - - - 220
See POWER, GENERAL OR SPECIAL.

—— Sale in mortgage deed—Extinction by transfer - - - - 482
See EXTINCTION OF POWER.

—— Sale in a settlement—Duration of - 349
See DURATION OF POWER.

—— Special—Direction for payment of debts
See SPECIAL POWER. 550

POWER, GENERAL OR SPECIAL—*General Power of Appointment—Subsequent Limited Power—Exercise during Coverture.*] A general power of appointment was given to a *feme sole* under a settlement of her property, with subsequent trusts, in default of appointment, for herself and any future husband, and a power of appointment among children, and with a provision that her after-acquired property should be subject to the same trusts:—*Held*, that the general power could be exercised during coverture, and that an appointment made in exercise of it after marriage in favour of the donee of the power and her husband was valid. *Gould* v. *Gould* (2 Jur (N.S.) 484) not followed. WOOD *v.* WOOD - - 220

PRACTICE—Administration summons—Real estate—When granted - - 230
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—— Affidavit—Informality - - - 52
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—— Confirmation of Sale—Service - 531
See CONFIRMATION OF SALES ACT.

—— Costs in cause - - - - 557
See COSTS IN CAUSE.

—— Declaration of Title Act - - 402
See DECLARATION OF TITLE ACT.

—— Demurrer to part of bill without answering the rest - - - - 471
See RECEIVER.

—— Exceptions to answer - - - 23
See EXCEPTIONS TO ANSWER.

—— Partition Suit—Sale - - - 347
See PARTITION SUIT.

—— Revivor and supplement - - 401
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—— Special examiner—Fees and charges 139
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—— Staying proceedings—Defendant submitting to demand - - - - 610
See STAYING PROCEEDINGS.

—— Waiver of irregularity—Motion to dismiss
See WAIVER OF IRREGULARITY. [215

PRESCRIPTION — Right of common — Interruption - - - - 105
See RIGHT OF COMMON.

PRIORITY—Mortgagee parting with title-deeds
See PRIORITY FROM NEGLIGENCE. [92

PRIORITY FROM NEGLIGENCE — *Mortgage—Mortgagee parting with Title Deeds.*] *B.*, a mortgagee of leasehold property, lent the lease to the mortgagor, for the purpose of raising money upon it, but at the same time told the mortgagor to inform the person from whom he proposed to borrow the money that *B.* had a prior charge. The mortgagor borrowed money from his bankers upon the security of a deposit of the lease without giving them notice of *B.'s* mortgage:—*Held*, that *B.'s* mortgage must be postponed to that of the bankers. BRIGGS *v.* JONES - - - - - - 92

PROFITS—Arrears of—Interest - - 393
See INTEREST ON BALANCE.

PROMISSORY NOTE—Security for present advance - - - - 467
See SECURITY FOR BALANCE.

PROMOTION OF BILL IN PARLIAMENT—Costs of—Application of rates - - 152
See APPLICATION OF RATES.

—— Expenses of Parliamentary agents—Abandonment of railway - - 613
See RAILWAYS ABANDONMENT ACT.

PROOF FOR FEU DUTIES—*Company—Feu Charter—Scotch Law—Claim of Superior in respect of future Feu Duties—Companies Act*, 1862, *s.* 158.] A company, assignees from a former company of a piece of land in *Scotland*, which had been disponed to them by the heritable proprietor on payment of certain feu duties, having been ordered to be wound up:—*Held*, that the superior was entitled to enter a proof for the feu duties then due, and also entitled to enter a claim, but not a proof, for the

PROOF FOR FEU DUTIES—*continued.*
capitalised value of the future feu duties. *In re* Gartness Iron Company. *Ex parte* Lord Elphinstone - - - - - 412

PROSPECTUS—Misrepresentation in - 503
See Misrepresentation in Prospectus.

PURCHASE-MONEY—Lands Clauses Act—Investment—Costs - - - 612
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—— Payment out of Court—Matter transferred from Court of Exchequer—Costs 532
See Costs of Payment out of Court.

RAILWAY COMPANY—Abandonment—Bond for completion of railway - - 613
See Railways Abandonment Act.

RAILWAY STOCK—Investment by trustees 26
See Investment by Trustees. I.

RAILWAYS ABANDONMENT ACT, 1869 (32 & 33 *Vict. c.* 114), *s.* 5—*Application of Deposit or Bond—Promotion of Company—Preliminary Expenses.*] Upon the construction of sect. 5 of the *Railways Abandonment Act*, 1869, claims in respect of expenses incurred by Parliamentary agents in getting the bill of a projected railway company passed through Parliament, and for moneys advanced by the intending contractor for the same purpose, are debts which have been incurred on account of the promotion of the company; and the Court, under the discretion given by that section, will not hold it reasonable, as between such creditors and the surety to the bond, that their debts should be paid out of the bond, which, by the warrant for the abandonment of the railway, has been directed to be applied as part of the assets of the company. *In re* Brampton and Longtown Railway Company - - - - - - 613

RATES—Application of—Improvement Commissioners - - - - 132
See Application of Rates.

REAL ESTATE — Administration summons — When granted - - - 230
See Administration Summons.

"REAL ESTATE"—*Charge upon "Real Estate"—Testator possessed of Leaseholds and no Freeholds.*] A testator gave his real estate upon trust to pay to his housekeeper 12*s.* per week, and the remainder of the rents and profits to be divided as therein mentioned. The testator had no freehold estate, but he had leaseholds for a long term, which he always believed to be of freehold tenure:—*Held*, that the leaseholds were charged with the weekly payment. Gully *v.* Davis 562

REAL AND PERSONAL ESTATE—Charge of debts—Exoneration of personalty 545
See Exoneration of Personal Estate.

RECEIVER — *Pendente lite—Real and Personal Estate — Administrator — Jurisdiction — Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *ss.* 70, 71—*Practice—Partial Demurrer without Answer.*] Upon the death of a person intestate, two persons, claiming to be coheiresses-at-law and sole next of kin of the intestate, entered into possession of the intestate's real estate, and obtained a grant of letters of administration of the personal estate. The Plaintiff, who claimed to be heir-at-law and one of the next of kin of the intestate, commenced

RECEIVER—*continued.*
proceedings in ejectment for the recovery of the real estate, and also took proceedings in the Probate Court for a recall of the letters of administration, and then filed a bill for the appointment of a receiver pending the litigation. One of the coheiresses demurred to the whole bill; the other demurred, without answering, to so much of the bill as sought relief in respect of the real estate:—*Held*, that both demurrers were good: the partial demurrer, because the Court has no jurisdiction to appoint a receiver in a simple case of contested heirship; and the demurrer to the whole bill, on the ground that where administration has been granted the Court will not exercise its jurisdiction to appoint a receiver of personal estate, unless a special case is made—a rule which will be strictly enforced, since the *Probate Act* of 1857 (20 & 21 Vict. c. 77), enables the Court of Probate to appoint an administrator *pendente lite*, with powers similar to those of a receiver.—Since the passing of the *Chancery Improvement Act* (15 & 16 Vict. c. 86) a Defendant may demur to part of a bill without answering the rest. Hitchen *v.* Birks - - - - - - 471

RECITAL — Intention not to exercise power of sale - - - - - 432
See Extinction of Power.

RECOVERY OF DEPOSIT - - - 73
See Variance between Prospectus and Memorandum.

RECREATION—Right of - - - 105
See Right of Common.

RECTIFICATION—Settlement—Mistake - 599
See Mistake in Settlement.

REDUCTION INTO POSSESSION.] A fund to which a married woman became entitled during coverture will not be considered as reduced into possession by the husband where he has not been at any time in a position to assert his rights by action for the amount as money had and received to his use.—*A.*, being sole executor and trustee of *X.'s* will, appointed *B.* and *C.* as his co-trustees, and by deed assigned all *X.'s* property to himself, *B.*, and *C.*, upon the trusts of the will. *B.* (who was also *A.'s* solicitor), as trustee, opened an account at a bank in the name of "The Executor of *X.*" A share of *X.'s* estate, to which *A.'s* wife, or *A.* in her right, was entitled, having become divisible, *B.*, after advising her as to an investment, drew a cheque in his own name in favour of *A.'s* wife, and the money was invested in a debenture which was taken in the names of *B.* and *D.* as trustees for her:—*Held*, that there had been no reduction into possession of the share by *A.* Aitchison *v.* Dixon - - - 589

REDUCTION OF CAPITAL AND SHARES—*Company—Superfluous Capital—Distribution amongst Shareholders—Lease—Claim of Lessor in respect of future Rent—Companies Act*, 1862, *s.* 158—*Companies Act*, 1867, *s.* 14.] When a limited company reduces its capital a lessor is entitled to have a sum impounded to answer future rent. *In re* Telegraph Construction Company - 384

REGISTER OF PROPRIETORS OF PATENTS—*Assignment—Suit by unregistered Assignee of Patent—Patent Law Amendment Act*, 1852 (15 & 16 *Vict. c.* 83), *s.* 35.] The assignee of a patent

REGISTER OF PROPRIETORS OF PATENTS—*continued.*
may maintain a suit against the assignor, and subsequent licensees from the assignor with notice of the assignment, to restrain them from using the patent, although at the time of the institution of the suit the assignment has not been registered pursuant to the 35th section of the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83).—*Semble*, registration of the assignment of a patent relates back to the date of the assignment, so as to entitle the assignee to maintain a suit to restrain infringement instituted between the dates of the assignment and the registration. Hassall *v.* Wright - - 509

REGISTRATION — Creditors' deed — Power of Court to annul - - - 57
See Annulling Registration.

RENEWABLE LEASEHOLDS—Apportionment [572
See Apportionment—Tenant for Life and Remainderman.

RESCINDING CONTRACT — *Vendor and Purchaser—Conditions of Sale—Objection to Title—Compensation — Dispute as to Vendor's Right to Mines.*] Upon a sale of freehold land, described as containing valuable limestone and freestone, one of the conditions provided that the purchaser should be considered to have accepted the title, unless he should within a certain time deliver to the vendor some valid objection to the title, and that, if any objection or requisition should be delivered and persisted in, the vendor might rescind the contract; and another condition provided, that if any mistake should appear to have been made in the description of the property, or of the vendor's interest therein, it should not vitiate the sale, but compensation should be given. The vendor's title-deeds contained a reservation to the lord of the manor of the right to the mines and minerals under part of the property; but the vendor asserted that, by the custom of the manor, the lord's right did not extend to limestone and freestone, and that there were no other minerals under the property. The purchaser having claimed compensation, the vendor rescinded the contract:—*Held*, that the purchaser's objection involved a question of title between the vendor and the lord of the manor, and that the vendor was entitled to rescind the contract; and a bill by the purchaser for specific performance with compensation was dismissed. Mawson *v.* Fletcher - - - 212

RESIDENCE—Property required for—Vendor and purchaser - - - - 281
See Time the Essence of the Contract. 2.

RESIDUARY GIFT—"Rest of my lands at *H.*"
See Secret Trust. [488

RESTRAINT ON ANTICIPATION—*Marriage Settlement—Power of Appointment amongst Children—Appointment to Married Daughter for Separate Use, with Restraint upon Anticipation — Rule against Perpetuities — Rejection of Restraint Clause — Similar Appointment to Unmarried Daughter — Subsequent Marriage.*] A widow, having under her marriage settlement a power of appointment amongst the children of the marriage, executed the power by giving to one of her five daughters, who was married, a fifth share of the fund for her separate use, independently of her then or any future husband, but without power of anticipation; and after her decease as she should generally by deed or will appoint, and in default of appointment, for her executors and administrators absolutely:—*Held*, that the whole appointment was not void, and that it was a valid execution of the power, except as to the restraint upon anticipation, but that the attempted restraint upon anticipation was ineffectual and void.—Observations on *Fry* v. *Capper* (Kay, 163).—A similar appointment was made to another daughter, unmarried at the date of the appointment, who afterwards married:—*Held*, that marriage did not operate as an adoption of the trusts of the fund so as to establish the validity of the restraint clause. *In re* Teague's Settlement [564

RESTRAINT ON ANTICIPATION—*continued.*

REVERSIONARY INTEREST—Sale of - 641
See Unconscionable Bargain.

REVIVOR AND SUPPLEMENT—*Practice—Death of one of three Co-Plaintiffs—Form of Supplemental Order*—15 & 16 *Vict. c.* 86, *s.* 52.] After bill filed by a tenant for life of one third and the owner in fee of two thirds of real estate, against a company for specific performance, and after answers, amendment of bill, notice of motion for decree, and cause set down for hearing, the first-mentioned Plaintiff died, and the share of which she had been tenant for life passed to *A.* as tenant in tail in possession:—Order made that the Plaintiffs should be at liberty to prosecute the decree, and have the same benefit of the proceedings against the Defendants, the company, and also against *A.*, as tenant in tail, as they would have had if *A.* had been originally a Defendant. Williams *v.* Llanelly Railway and Dock Company [401

—— Motion to dismiss for want of prosecution
See Waiver of Irregularity. [210

RIGHT OF COMMON—*Bill on behalf of Freeholders of Manor—Frame of Suit—Evidence of Right—Burden of Proof—Custom and Prescription—Interruption*—2 & 3 *Will.* 4, *c.* 71—*Right of Recreation.*] A suit for the purpose of establishing a right of common over the wastes of a manor may be maintained by one freehold tenant of the manor on behalf of himself and all other freehold tenants.—It is not incumbent on the Plaintiff in such a suit to prove that a right of common was granted at the same time as the land; but the Court will presume the grant where the user has been long-continued and uninterrupted, and the burden of proof lies on the lord who seeks to disturb the long-continued user.—Where the lord has attempted to stop the user of a common, the fact that some of the tenants have yielded to such attempts is not an interruption of the right within the meaning of the *Prescription Act* (2 & 3 Will. 4, c. 71), so far as to bar the rights of freeholders who, as a body, have never yielded to, or acquiesced in, the claim of the lord.—Discussion as to claims to a right of recreation over a common.—Whether freehold tenants can claim by custom, *quære.*—*Earl of Dunraven* v. *Llewellyn* (15 Q. B.

RIGHT OF COMMON—*continued.*
791) considered. WARRICK *v.* QUEEN'S COLLEGE, OXFORD - - - - - 105
RIVER—Navigable—Obstruction in - 232
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—— Pollution of - - - - 131
See POLLUTION OF RIVER.

SALE — Execution creditors — Liquidation by arrangement - - 419, 425, 432
See EXECUTION CREDITOR. 1—3.
—— Mortgage—Mortgagee in possession—Interest on partner's money - - 497
See MORTGAGEE IN POSSESSION.
—— Mortgage suit—Costs of puisne mortgagee
See COSTS IN MORTGAGE SUIT. [447
—— Partition suit - - - - 347
See PARTITION SUIT.
—— Sequestration (27 & 28 Vict. c. 112) - 442
See SEQUESTRATION.
SCOTCH SEQUESTRATION—Effect of - 604
See FORFEITURE CLAUSE.

SECRET TRUST—*Will—Mortmain—Devise void in Law—Residuary Gift—Wills Act* (1 *Vict. c.* 26), *s.* 25.] Testatrix, who had executed a deed of gift (which was enrolled) of lands at *H.* to three trustees for founding a charity, died within a year of its execution, having by her will devised the same lands, in case she should not in her lifetime have effectually disposed of them, to *A.*, *B.*, and *C.* (two of whom were trustees of the deed) as joint tenants, and she devised certain lands to the Plaintiff by the following description: "The rest of my hereditaments at *H.*, and all my hereditaments at *S.* and *W.*" The Plaintiff filed a bill impeaching the devise as being a secret trust for charitable purposes, and claiming to be entitled to the lands:—*Held*, that as the evidence shewed that the testatrix devised the lands in full reliance that the devisees would carry out her object, and that the trust was tacitly accepted by them, the devise was therefore void:—*Held*, also, that the words "the rest of my lands at *H.*," were not a residuary devise within s. 25 of the *Wills Act* (1 Vict. c. 26), and that the lands in question were undisposed of. SPRINGETT *v.* JENINGS - 488
SECURITY—Balance of current account - 467
See SECURITY FOR BALANCE.
—— Delivery up of - - - - 11
See CREDITOR HOLDING SECURITY.
—— For costs—Declaration of Title Act - 402
See DECLARATION OF TITLE ACT.

SECURITY FOR BALANCE—*Promissory Note—Principal and Surety—Current Account—Burden of Proof.*] A promissory note given by principal and surety for a definite sum, and payable on a fixed day, is presumed to be given in consideration of an advance at the date of the note: and if the payee asserts, as against the surety, that the object of the note was to secure the payment of the balance of an account current between the principal and the payee, the burden of proof lies on the payee. *In re* BOYS. EEDES *v.* BOYS. *Ex parte* HOP PLANTERS COMPANY - - - 467
SEIZURE AND SALE—Execution creditor—Liquidation by arrangement 419, 425, 432
See EXECUTION CREDITOR. 1—3.

SEPARATE ESTATE, LIABILITY OF—*Married Woman—Bill of Exchange.*] A married woman living abroad, alone, under circumstances which led to the belief that she was a *feme sole*, indorsed a bill of exchange, and drew a cheque on her *London* bankers for the purpose of enabling *T.*, who acted as her agent, to raise money. The bill and cheque were cashed by *M.*, a banker at *Paris*, but were dishonoured:—*Held*, that the separate estate of the married woman was liable to make good the amount, irrespective of any equities between her and *T.* MCHENRY *v.* DAVIES - 88
SEPARATE USE—Restraint on anticipation 564
See RESTRAINT ON ANTICIPATION.

SEQUESTRATION — *Judgment Creditor — Real Estate delivered in Execution—Sale*—27 & 28 *Vict. c.* 112, *ss.* 1, 4.] A debtor executed a conveyance of real estate to volunteers, and afterwards a writ of sequestration was issued against him at the instance of a creditor. The volunteers reconveyed the estate to a trustee for the sequestrators; and they entered into possession:—*Held*, that the sequestrators and creditor were entitled to an order for the sale of the real estate under 27 & 28 Vict. c. 112. *In re* RUSH - - 442
—— Scotch—Effect of - - - 604
See FORFEITURE CLAUSE.
SERVICE—Petition under Confirmation of Sales Act - - - - - 531
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—— Winding-up petition—Service on directors
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—— Covenant to settle after-acquired property
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—— General power to wife — Exercise during coverture - - - - 220
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—— Power of sale—Duration of power - 349
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—— Voluntary—Improvidence—Lady just of age
See VOLUNTARY SETTLEMENT. [405
SEWAGE—Pollution of river - - 131
See POLLUTION OF RIVER.

SEWERS—*Landowner and Public Body—Statutory Rights—Permanent Trespass—Injunction—Lands Clauses Act—Towns Improvement Clauses Act—Compulsory Powers.*] Defendants, the corporation of a borough, were empowered by a special Act (which incorporated the *Towns Improvement Clauses Act*, 1847) to make sewers; but it was provided that it should not be lawful for them to cause any new sewer to open or drain into the river *Roche* at any point above the *Town Mill Weir*.

SEWERS—*continued.*

Plaintiffs, the owners in fee of the *Town Mill* and *Weir*, and occupiers of the mill, complained that the Defendants were making a large new sewer in the principal street of the town, and other new sewers, which would open or drain into the river above the weir, and prayed for an injunction to restrain these acts. The evidence shewed that the Defendants had made the large new sewer complained of nearly on the site of an old sewer, but larger and deeper, that several drains had been made into it which could not have been made into the old sewer, and that it was intended to make many more such drains; also that they were making other new sewers, which would drain into the river above the weir:—Injunction granted to restrain the Defendants from causing or permitting any sewer (omitting the words "or drain") to be opened into the new sewer, or any other new sewer to open or drain into the river at any point above the *Town Mill Weir*. Defendants were empowered by their special Act from time to time, as they should think proper, to cleanse and otherwise improve the river, and for such purpose "to remove or alter" the *Town Mill Weir*. They had no compulsory powers of taking the weir, but they were empowered to purchase land by agreement, and the Act provided that full compensation should be made to all persons "sustaining any damage" by reason of the exercise of any of the powers of the Act. Defendants, having entered upon the weir and removed part of the same, and having permanently occupied the space by a floodgate, Plaintiffs, not alleging damage, prayed that the Defendants might be restrained from entering upon or continuing in possession of the weir, or any land or property of the Plaintiffs, or any part thereof, and from taking or using the same, without consent of the Plaintiffs:—Injunction refused, and bill as to this part of the relief dismissed. Holt *v.* Corporation of Rochdale - 354

SHARES—Transfer of—Shareholder - 47
See Custom of Stock Exchange.

SOLICITOR—Retention of costs before delivering bill - - - - - 165
See Taxation of Costs.

SPECIAL EXAMINER — *Practice — Fees and Charges—Regulations subjoined to Consolidated Orders, Schedule* 1.] The sum of £2 2s. a day, which a special examiner is entitled to receive for his expenses under the regulations subjoined to the Consolidated Orders, is a fixed sum payable in every case, without reference to the amount of expenses actually incurred by the special examiner, and does not include the expense of hiring a room for the purpose of the examination. Wright *v.* Larmuth - - - - 139

SPECIAL POWER—*General Appointment—Payment of Debts.*] A testatrix having a general power to appoint £500, and a special power to appoint the residue of certain property, gave all her real and personal estate whatsoever and wheresoever, and of which she had any power to appoint or dispose of, to trustees, in the first place to pay her debts, funeral and testamentary expenses, and then to divide the residue between the objects of the special power:—*Held*, that the special power was well executed.—*Clogstoun* v. *Walcott* (13 Sim. 523) not followed. Ferrier *v.* Jay - - - - - - - 550

SPECIALTY DEBT — *Unregistered Company — Winding-up — Liability of Contributory—Companies Act*, 1862, *ss.* 75, 199—*Deceased Contributory—Administration of Assets—Proof by Liquidator.*] The liability of a shareholder of a company not registered under the Act of 1862, but wound up under it, to contribute to the assets of the company, is in the nature of a specialty debt.—The liquidator of such a company is entitled to prove against the estate of a deceased contributory for the estimated value of such liability, although no call has actually been made in the winding-up, and to have a proportionate share of the fund set apart to meet it. *In re* Muggeridge. Muggeridge *v.* Sharp. *Ex parte* Bank of London and National Provincial Insurance Association - - - 443

2. —— *Administration—Legal and Equitable Assets—3 & 4 Will. 4, c.* 104—*Insufficient Estate—Call made in a Winding-up—Nature of Liability—Companies Act*, 1862, *s.* 75.] The liability of a contributory to pay calls made since a winding-up is a debt by specialty which binds the heirs of the contributory. Buck *v.* Robson - 629

SPECIFIC PERFORMANCE — Compensation — Right to rescind contract - - 212
See Rescinding Contract.

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—— Doubtful title—Good holding title - 5
See Fraudulent Appointment.

—— Standing by and allowing building 141, 678
See Standing by and allowing Building. 1, 2.

—— Time the essence of the contract 228, 281
See Time the Essence of the Contract. 1, 2.

SPECIFICATION OF PATENT—*Patent—Use of new Materials to produce a known Article.*] The Plaintiff obtained a patent for the use of animal fibre, by preference Russian wool, or wool of a coarse texture, in the manufacture of artificial hair to be made up as ladies' head-dresses, and for upholstery, and other like purposes. Upon bill filed to restrain an infringement of the patent:—*Held*, that the specification was too extensive; that even the use of a new material to produce a known article could not be the subject of a patent unless some invention and ingenuity were displayed in the adaptation; that in this case a prior user of wool for the same purpose was proved by the evidence, and that the bill must be dismissed with costs. Rushton *v.* Crawley [522

STANDING BY AND ALLOWING BUILDING—*Lessor and Lessee—Agreement for Lease—Copperworks—Easement of Plaintiff to take Water from Defendant's Canal—Mutual Understanding—Acquiescence.*] The Defendant being the owner of a canal of which the Plaintiffs were large customers, a mutual understanding was come to between the parties, that so long as the Plaintiffs remained good customers of the canal they should be allowed to use the superfluous water of

STANDING BY AND ALLOWING BUILDING—*continued.*
the canal for the purposes of copperworks, of which they were occupiers under an agreement for lease with the Defendant. It was shewn that the use of the water of the canal, though convenient and economical, was not absolutely essential to the Plaintiff's works:—*Held*, that such an understanding did not form the foundation of an equitable right.—*Secus*, if the Plaintiffs with the knowledge of the Defendants had incurred expense in establishing a manufacture for which the use of the water was absolutely necessary.—*Clavering's Case* (5 Ves. 690) considered. BANKART *v.* TENNANT - - - - - 141

2. —— *Corporation—Agreement not under Seal—Acquiescence—Specific Performance.*] A municipal corporation passed a resolution in January, 1860, agreeing to let land to *C.* for 300 years, to be stumped out by a committee and himself at his expense. The corporation did not stump out the land, and *C.* afterwards stumped out the land himself, took possession of it, erected a terrace on the land, and paid rent to the corporation:—*Held*, that *C.* was entitled to a decree for specific performance, the corporation having acquiesced in all that he had done:—*Held*, further, that the right of the corporation to grant such a lease could not be disputed in this suit. CROOK *v.* CORPORATION OF SEAFORD - - - 678

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9 Geo. 2, c. 36—*Mortmain* - - 246
See GIFT TO ESTABLISH HOSPITAL.

3 & 4 Will. 4, c. 27, s. 23—*Limitations* 99
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—— c. 74—*Fines and Recoveries* - 17
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4 & 5 Will. 4, c. 22, s. 2—*Apportionment* 635
See APPORTIONMENT WHEN NO DEATH.

3 & 4 Vict. c. 87—*Metropolis Improvement* 671
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6 & 7 Vict. c. 73, s. 41—*Solicitors* - 165
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8 Vict. c. 18, s. 70—*Lands Clauses* - 612
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—— —— s. 74 - - - - 572
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—— c. 86, s. 12—*Chancery Improvement* 471
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—— c. 108, s. 2—*Confirmation of Sales Act*
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27 & 28 Vict. c. 112, s. 1—*Judgments* - 442
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30 & 31 Vict. c. 131, s. 14—*Companies* 384
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31 & 32 Vict. c. 4, s. 1—*Usury* - - 641
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—— c. 40—*Partition* - - - 347
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—— c. 71, s. 92—*Bankruptcy* - - 648
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—— c. 114, s. 5—*Railways Abandonment* 613
See RAILWAYS ABANDONMENT ACT.

STAYING PROCEEDINGS — *Practice — Costs.*] When the Defendant offers to comply with Plaintiff's demand, and would have done so, if asked, before bill filed, the Court will stay all further proceedings without costs. RUDD *v.* ROWE [610

STOCK EXCHANGE—Custom of - - 47
See CUSTOM OF STOCK EXCHANGE.

SUBSTITUTIONAL GIFT - - - 347
See Gift, original or substitutional.

SUCCESSION DUTY—16 & 17 *Vict. c.* 51—*Will—Legacy—Bequest in Trust for Persons in Succession—Foreign Domicil.*] A testator who was domiciled in *Belgium*, but for the last ten years of his life resided and carried on business in *England* by his will directed a sum of £12,000 to be invested in consols and held in trust for *A.* for life, with remainder for his nephews and nieces, most of whom were Belgians:—*Held*, that upon the death of *A.* succession duty was payable on the £12,000.—*In re Smith's Trusts* (12 W. R. 933) and *In re Capdevielle* (2 H. & C. 985) followed.—*Wallace* v. *Attorney-General* (Law Rep. 1 Ch. 1) distinguished. *In re* Badart's Trusts - 288

SUPPLEMENTAL ORDER: - - 401
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SURETY—Co-sureties by separate instruments—Contribution - - - 529
See Co-Sureties.

—— Security for balance of current account 467
See Security for Balance.

SURVIVORSHIP—*Will—Construction—"Other surviving" read "Other."*] A testator devised real estate in trust for his children, *G.*, *J.*, *E.*, and *M.*, in equal shares as tenants in common during their respective lives, and after their respective deaths in trust for such of the children of his said children respectively as should attain twenty-one, or die under that age leaving issue, and his, her, or their heirs and assigns, if more than one, as tenants in common; but so that the child or children of each of his children should take his, her, or their parent's share only; and in case of a failure of such issue of either of his said children, then in trust for his other surviving children or child in like manner in all respects as their, his, or her original shares or share were or was thereinbefore given.—*E.* died in the testator's lifetime, leaving a child; *J.* survived the testator and died childless, leaving *G.* and *M.* and *E.'s* child surviving:—*Held*, that the words "other surviving" must be read "other," and that *E.'s* child took one-third of *J.'s* share.—*Milsom* v. *Awdry* (5 Ves. 465) disapproved. *In re* Arnold's Trusts 252

SUSPENSION OF POWER—Transfer of mortgage
See Extinction of Power. [482

TAXATION OF COSTS—*Solicitor—Payment—Retention of Costs by Solicitor before delivering Bill*—6 & 7 *Vict. c.* 73, *s.* 41.] A solicitor retained the amount of his bill of costs out of money in his hands belonging to the client, and the client, on receiving the balance of the money, but before the bill of costs had been delivered, signed an account in which the total amount of the costs was an item, and gave a receipt for the balance:—*Held*, that there had been no payment of the bill within the meaning of 6 & 7 Vict. c. 73, s. 41: and that the client was entitled to have the bill taxed more than a year after the retainer of the costs and the signature of the account:—*Held*, also, that a special application was necessary under the circumstances. *In re* Street - - - - - - 165

TENANT FOR LIFE AND REMAINDERMAN—Appointment of additional trustee—Costs of petition - - - 45
See Costs out of Income.

—— Apportionment - - - - 572
See Apportionment—Tenant for Life and Remainderman.

—— Impeachment of waste - - - 259
See Executory Settlement.

—— Ornamental timber - - - 465
See Timber.

TIMBER—*Ornamental Timber—Equitable Waste—Damage to Inheritance.*] Although the Court of Chancery will grant an injunction to restrain a tenant for life from cutting down ornamental timber, irrespective of the question whether or not any damage would be occasioned to the inheritance by such cutting; yet, when the ornamental timber has been actually felled, and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damages can only be measured by the damage done to the inheritance. Bubb *v.* Yelverton. *Ex parte* Hastings - - - - 465

TIME THE ESSENCE OF THE CONTRACT—*Practice—Specific Performance—Inquiry as to Title—Objection raised too late—Declaration as to Waiver.*] Where a decree has been made for specific performance of a contract for purchase of real estate in the ordinary form, directing an inquiry whether a good title can be made, it is too late for the purchaser to take under that inquiry, for the first time, an objection to title disclosed by an abstract delivered previously to the commencement of the suit, but not taken within the time limited, as of the essence, by the conditions. Upperton *v.* Nickolson - 228

2. —— *Specific Performance—Contract for Sale—Waiver—Property required for Residence.*] Upon a contract for the sale of a house and land required for immediate residence, the conditions were that the purchase should be completed at noon on the 26th of February, on which day the purchaser, having paid his purchase-money, was to be entitled to possession; but if, from any cause whatever, the purchase should not then be completed, the purchaser was to pay interest on the purchase-money from that day until the completion; and if any objections or requisitions as to title should be made upon the delivery of the abstract which the vendor should be unable or unwilling to remove, then the vendor was to be at liberty to cancel the contract. The vendor failed to complete his title by the day named; but negotiations were continued till the 7th of April, on which day notice was given by the purchaser of immediate abandonment of the contract. Upon bill filed by the vendor for specific performance:—*Held*, that as a possible postponement of completion of the contract was contemplated by the terms of the agreement, time was not of the essence of the contract, and that if it had been so the purchaser, by continuing the negotiations as to title after the day fixed for completion, had waived it, and could not rescind without reasonable notice.—Decree for specific performance, with the usual inquiry as to title. Webb *v.* Hughes - - - - - 281

TITLE-DEEDS—Mortgagee parting with—Negligence - - - - 92
See Priority from Negligence.

TRANSFER OF BUSINESS - - - 622
See Amalgamation of Companies.

TRANSFER OF CAUSE—County Court—Chancery - - - - 683
See County Court Jurisdiction.

TRANSFER OF SHARES—*Winding-up Act*, 1848—*Contributory—Transfer subsequent to Presentation of Petition.*] Where shares in a company have been transferred in the interval between the presentation of a Petition for winding up the company under the *Joint Stock Companies Winding-up Act*, 1848, and the date of the order, the transferor, and not the transferee, is the proper person to be settled on the list of contributories in respect of the shares. *In re* Consols Insurance Association. Glanville's Case - 479

—— Transfer in blank - - - 659
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—— Gift for benefit of herself and family 267
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TRUSTEE—Appointment of new—Costs—Tenant for life and remainderman - 45
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—— Costs—Unnecessary suit - - 664
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—— Investment by—Foreign securities—French railway - - - - 39
See Investment by Trustees. 2.

—— Investment by—Railway stock - 26
See Investment by Trustees. 1.

TRUSTEES' COSTS — *Payment into Court — Unnecessary Suit.*] Any trustee who entertains a reasonable doubt or difficulty as to the title of the person who claims to be his *cestui que trust*, should pay the funds into Court under the *Trustee Relief Act*. A trustee, who, entertaining such doubt, did not pay the funds into Court, but by his conduct caused the institution of a suit, was allowed out of the funds only the costs that he would have been entitled to if he had paid the funds into Court under the Act, and the costs of appearing on the petition. Gunnell *v.* Whitear [664

TRUSTEE RELIEF ACT—Duty of trustees as to payment into Court - - 664
See Trustees' Costs.

UNCONSCIONABLE BARGAIN—*Reversionary Interest—31 & 32 Vict. c. 4, s. 1.*] The Defendant, a money lender, having agreed with the Plaintiff, who was just twenty-one, and was in difficulties, to lend him £150 on his reversionary interest under his father's will, exacted securities for £200, with interest at 20 per cent., reducible to 10 per cent. on punctual payment, and advanced only £123, but claimed interest on the whole amount secured. The Court declared that the securities should stand as a security for the money actually advanced with interest at 5 per cent., although the Plaintiff had been assisted by a solicitor, who, however, stated that he was not accurately informed of the transaction.—The jurisdiction of the Court over unconscionable bargains is not affected by the repeal of the Usury Laws, or by the 31 & 32 Vict. c. 4, s. 1. Miller *v.* Cook 641

UNREGISTERED MORTGAGE — *Company — Winding-up—Directors—Companies Act*, 1862, *s.* 43.] In the winding up of a company registered under the *Companies Act*, 1862, directors will not be allowed to set up against the general creditors a mortgage of, or charge on, the property of the company not registered pursuant to the 43rd section of the Act.—*Quære*, whether an unregistered mortgagee, not being a director, can set up his mortgage against the unsecured creditors.—A company, whose articles of association authorized the directors, with the sanction of a resolution of the company, to borrow money on mortgage, being indebted to their bankers on an overdrawn account, the payment of which some of the directors had personally guaranteed, passed a resolution authorizing the directors to raise money on a mortgage of the property of the company, to be applied in discharging the liabilities of the company, or any director or other person on behalf of the company, to the bankers; the resolution also confirmed the acts of the directors and any sureties of the company in reference to the creation or continuance of the liabilities to the bankers, and declared that the bankers, directors, and sureties should stand in the same position as to their claims against the company as if such liabilities had been originally loans specially authorized and secured by mortgage under the articles. No mortgage was executed, the resolution was not communicated to the bankers, and no charge on the property of the company in favour of the bankers or the guaranteeing directors was registered under the 43rd section of the *Companies Act*, 1862:—*Held*, in the winding-up of the company, that the resolution not having been communicated to the bankers did not entitle them to a charge on the property of the company; and that, assuming the resolution to have created a charge in favour of the guaranteeing directors, their omission to register it disentitled them to set it up against the general creditors of the company. *In re* Wynn Hall Coal Company. *Ex parte* North and South Wales Bank - - - - - 515

USER—Interruption of - - - 105
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VARIANCE BETWEEN PROSPECTUS AND MEMORANDUM — *Company — Recovery of Deposit and Calls—Liability of Directors—Fraud—Mis-*

VARIANCE BETWEEN PROSPECTUS AND MEMORANDUM—*continued.*

representation—Scienter—Jurisdiction.] A person who has had his name removed from the register of shareholders of a company for variance between the memorandum and prospectus is not entitled to file a bill for the purpose of compelling the directors personally to refund the deposit and calls he has paid in respect of the shares, unless they have been guilty of fraud; and, *semble*, his relief against the company is at law.—A prospectus issued early in May stated that more than half the capital had been subscribed for. On the 28th of May the Plaintiff applied for shares, which were allotted to him on the 1st of June. At the time when the prospectus was issued half the shares had not been applied for; but before the 28th of May applications for more than half the capital had been received, and before the 1st of June for more than the whole:—*Held*, that there was no misrepresentation for which the Plaintiff was entitled to relief.—*Stewart* v. *Austin* (Law Rep. 3 Eq. 299) and *Henderson* v. *Lacon* (Law Rep. 5 Eq. 249) discussed. Ship *v.* Crosskill - - - 73

VENDOR AND PURCHASER—Doubtful title 449
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—— Fraudulent appointment — Benefit to appointor - - - - 5
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—— Right to rescind contract—Objection to title as to mines - - - - 212
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—— Time the essence of contract - 228, 281
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VESTING—Death before shares "payable" 224
See Death before "Payable."

VOLUNTARY GIFT—*Memorandum of Transfer of Bond—Non-delivery—Implied Declaration of Trust.*] A memorandum of a voluntary gift in this form, "I hereby give and make over to *M.* an *India* bond, value £1000," was signed by *S.*, and given by him to *M.*, without handing over the bond. *S.* died, and the residuary legatees under his will claimed the bond:—*Held*, that the memorandum was a good declaration of trust in favour of *M.*, and that he was entitled to the bond. Morgan *v.* Malleson - - 475

VOLUNTARY SETTLEMENT—*Young Lady only just of Age—Improvidence—Deed set aside—Form of Voluntary Settlement for the Benefit of the Settlor, a young unmarried Lady.*] By a settlement executed by an unmarried lady a few months after she attained twenty-one, it was declared that a sum of money to which she was entitled absolutely should be held by the trustees (who were her stepfather and uncle), upon trust to invest the same in certain specified classes of securities, and vary the same at the trustees' discretion, and pay the income to the settlor for life, for her separate use, with restraint on anticipation if and when married, and, after her death, to hold the fund in trust for the settlor's children, as she should by will appoint; in default of appointment, for the children absolutely; and in default of children as the settlor should by will appoint, and in default for her next of kin. The trustees

VOLUNTARY SETTLEMENT—*continued.*

were empowered, at the settlor's request, to raise £700 out of the fund, and pay the same to her for her separate use. Power of appointing new trustees was reserved to the surviving or continuing trustees, or to the executors or administrators of the last surviving trustee. The deed was prepared under the advice of a solicitor, who was the solicitor and friend of the stepfather, and known to the Plaintiff. Upon bill, nine years afterwards, by the settlor (who had remained unmarried), to have the settlement set aside:—*Held*, that the deed was void, and must be set aside, on the ground of improvidence, and having regard to the age of the settlor; but, owing to the absence of all improper motive, the trustees were allowed their costs, charges, and expenses properly incurred.—Observations on the proper form of a settlement executed under the above circumstances. Everitt *v.* Everitt - 405

WAIVER OF IRREGULARITY—*Practice—Motion to dismiss—Waiver.*] A Defendant who has been added to the record by revivor cannot, after moving to dismiss for want of prosecution, move to discharge as irregular an order of course to amend, obtained before he was made a party to the suit. Kettlewell *v.* Barstow - 210

WARD OF COURT—*Infant—Order for Maintenance without Suit.*] An order for the maintenance of an infant made without suit constitutes the infant a ward of Court. *In re* Graham - 530

WASTE—Impeachment of executory settlement—"Strict settlement". - - 259
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WIFE'S SETTLED PROPERTY—*Marriage Articles—Husband's Adultery—Dissolution of Marriage—Subsequent Suit by Wife for Payment of Trust Fund.*] Under marriage articles, the personal property of the wife, who was then an infant, was agreed to be settled upon the usual trusts, with an ultimate trust for the wife absolutely, if she survived. No settlement was executed on the wife's attaining twenty-one. There were no children of the marriage. A decree for dissolution of the marriage was made by the Divorce Court on the suit of the wife. The wife filed her bill against her late husband and the trustee of the marriage articles for payment of the trust fund:—*Held*, that she was entitled to have the trust fund paid to her. Swift *v.* Wenman 15

WILL—Appointment—Property ineffectually appointed - - - - 1
See Appointment by Will.

—— Charity—Gift to establish hospital - 246
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—— Charity—Gift to such charities as trustees should think proper - - 668
See Gift to such Charities as Trustees should think proper.

—— Charity—Secret trust - - - 488
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WINDING-UP PETITION — *Jurisdiction — Companies Act*, 1862, *s.* 199—*Canal Company incorporated by Act of Parliament.*] The Court has jurisdiction under the *Companies Act*, 1862, s. 199, to wind up a canal company incorporated by Act of Parliament, and will make a winding-up order in such a case, although it may be necessary to apply for an Act of Parliament to enable the property of the company to be sold. —A canal company, whose canal had been disused for three years, in consequence of an injunction of the Court of Chancery restraining the company from supplying the canal with water from a stream which had become polluted, and of the impossibility of obtaining a supply of water from any other source without incurring very great expense, was ordered to be wound up on its own Petition. *In re* Bradford Navigation Company - - - 331

2. —— *Petitioners abroad—Affidavit verifying Petition—Place of Business—Service of Petition.*] Where a winding-up Petition was presented under a power of attorney executed by Petitioners resident in a colony to a solicitor in this country, it being impossible to comply with Rule 4 of the Order of November, 1862, the Court made the order upon verification of the Petition by an affidavit of the solicitor, deposing of his own knowledge to the facts stated in the Petition.—Where the registered place of business of a company had been demolished, service on directors at the present place of business, though not registered, was held sufficient. *In re* Fortune Copper Mining Company [390

3. —— *Petitioner in Arrear of Payment of Calls.*] A Petition for winding up a company, presented by a shareholder who, at the date of such presentation, is in arrear of payment of calls due from him to the company, will on that ground be dismissed. *In re* European Life Assurance Society - - - - - 403

WITNESS IN WINDING-UP — *Companies Act*, 1862, *s.* 115 — *Practice — Examination of Witnesses.*] The sister and nephew of an indebted contributory were summoned before the Examiner, and declined to answer:—*Held*, that they were bound to answer, although there were no facts proved except the relationship to connect them with the contributory or the company. *In re* Bank of Hindustan, China, and Japan. Swan's Case - - - - - 675

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LONDON:

PRINTED BY WILLIAM CLOWES AND SONS,

STAMFORD STREET AND CHARING CROSS.